NO. 90-1455

SUPREME COURT, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1990

CITY OF BRIDGE CITY, TEXAS
Petitioner

VS.

STATE OF TEXAS, EX REL.
CITY OF PORT ARTHUR, TEXAS, ET AL,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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ORAL ARGUMENT REQUESTED

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QUESTIONS PRESENTED

I. Whether the Texas Supreme Court violated the "due process clause" of the Fourteenth Amendment in denying Petitioner's relief because the application of *Res Judicata* to Petitioner is contrary to settled Texas law and Constitution.

II. Whether the Texas Supreme Court violated the "due process clause" of the Fourteenth Amendment in denying Petitioner's relief Error because the Quo Warranto action brought by the Jefferson County District Attorney was in violation of Texas statutory law and Constitution.

III. Whether the Texas Supreme Court violated the "due process clause" of the Fourteenth Amendment in denying Petitioner's relief because the Trial Court's unconditional award of appellate attorney's fees to Respondent infringed upon and inhibited Petitioner's fundamental right of access to the courts.

IV. Whether the Texas Supreme Court violated the "due process clause" of the Fourteenth Amendment in denying Petitioner's relief because the trial court's unsegregated attorney's fee award (awarding fees for work on all claims, when only one claim authorized a fee award) was unreasonable and contrary to Texas law.

V. Whether the Texas Supreme Court violated the "due process clause" of the Fourteenth Amendment in denying Petitioner's relief, the invalidation of "savings clauses" in Petitioner's annexation ordinances, thus being an unlawful deprivation of property.

VI. Whether the Texas Supreme Court violated the Eighth Amendment prohibition of excessive fines in denying Petitioner's relief because the Trial Court made an unconditional award of appellate attorney's fees to Respondent when Petitioner exercised its right to appeal.

VII. Whether the Texas Supreme Court violated the "equal protection clause" of the Fourteenth Amendment in applying legal doctrines differently as to Petitioner than as to others similarly situated.

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IN THE
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NO.

CITY OF BRIDGE CITY, TEXAS
Petitioner

VS.

STATE OF TEXAS, EX REL.
CITY OF PORT ARTHUR, TEXAS, ET AL,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUDGES OF THE
UNITED STATES SUPREME COURT:

COMES NOW, Petitioner, and seeks Writ of Certiorari to the Texas Supreme Court's judgment, and prays that same issue in these regards.

OPINIONS BELOW

The Texas Supreme Court Judgment is attached as Appendix "B". That court's denial of the Motion for Rehearing is attached as Appendix "A". The Beaumont Court of Appeals Judgment and majority Opinion is attached as Appendix "D", along with Judge Burgess' dissent, both reported at 792 S.W.2d 217 (Tex. App. - Beaumont 1990, writ denied). That court's denial of the Motion

for Rehearing is attached as Appendix "C". The trial court judgment and findings of fact and conclusions of law are attached as Appendices "F" and "E", respectively.

JURISDICTION

Petitioner invokes jurisdiction pursuant to 28 U.S.C. § 1254. The Texas Supreme Court's judgment was entered on October 31, 1990, and Motion for Rehearing was denied on November 28, 1990.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent texts of the following constitutional provisions relevant to the determination of the present case are set forth in the appendix: U.S. CONST. AMEND. XIV, §1[1] and U.S. CONST. AMEND. VIII.[2]

STATEMENT OF THE CASE

Petitioner (Bridge City), a resident of Orange County, Texas, annexed two contiguous tracts of land in Orange County, one containing a facility owned and operated by Gulf States Utilities. Respondent (Port Arthur), a resident of Jefferson County, Texas, filed a declaratory judgment action in Orange County against Bridge City, alleging the two tracts were wholly within its "extra territorial jurisdiction" and shielded from Bridge City's annexation. The Orange County District Courts recused themselves, and a visiting judge was appointed. Suit was later amended to include a Quo Warranto action brought by the Jefferson County District Attorney on behalf of the State of Texas — the Orange County Attorney and the Texas Attorney

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[1] Listed in Appendix G per U. S. Supreme Court Rule 14.1(f).

[2] Listed in Appendix H per U.S. Supreme Court Rule 14.1(f).

General refusing to do so.

After a bench trial, the District Court entered a Judgment adverse to Bridge City on January 27, 1989. Findings of Fact and Conclusions of Law were made by the Trial Court.

Timely appeal followed to the Ninth District Court of Appeals (Beaumont, Texas) resulting in a split decision affirming the trial court. Justice Burgess dissented from the two-Judge majority opinion (based on burden of persuasion, *res judicata*/collateral estoppel, establishment of extra-territorial jurisdiction, proper Quo Warranto officer, attorney's fees, and savings clauses to the annexation ordinances issues). The dissent would have reversed the trial court and render a take-nothing judgment against Port Arthur. Motion for Rehearing was timely filed in the Court of Appeals, same being denied on July 10, 1990.

Appeal was perfected to the Texas Supreme Court, which refused to review the matter, in effect affirming the Court of Appeals Judgment and majority opinion. Motion for Rehearing was timely filed in the Texas Supreme Court, same being denied on November 28, 1990. This appeal for relief timely followed.

GROUNDS FOR GRANTING WRIT

Pursuant to Rule 10, there are special and important grounds for granting this Writ of Certiorari:

1. The Texas Supreme Court so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision. Rule 10.1(a).

2. The Texas Supreme Court approved departure by

the "majority" of the Beaumont Court of Appeals so far from the acceptable and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 10.1(a).

3. The Texas Supreme Court approved the trial court's departure from the acceptable and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 10.1(a).

SUMMARY OF THE ARGUMENT

Res Judicata, the basis of the judgment of the state courts below, is inapplicable, inappropriate, and wrongfully applied to Petitioner. In 1970, Port Arthur, the City of Orange, and Port Neches acquired without litigation an "Agreed Judgment" from a Jefferson County District Court. This "Agreed Judgment" purported to establish Port Arthur's extra-territorial jurisdiction in the general area now in dispute to the exclusion of the cities of Orange and Port Neches.

Res Judicata does not apply where time changes facts or new facts emerge. There has been a material and substantial change of facts since the entry of the 1978 "Agreed Judgment", and new facts have emerged precluding *Res Judicata* effect for the 1970 "Agreed Judgment." Bridge City did not exist at the time of the 1970 "Agreed Judgment" and came into existence thereafter.

The 1970 "Agreed Judgment" cannot operate as *Res Judicata* at bar unless the prior suit and this one are identical as to causes, issues, and parties. Since Bridge City did not even exist at the time of the 1970 "Agreed Judgment," the element of "identical parties" is not met.

It is undisputed that Bridge City was not a party

to the prior suit, therefore it must be implied that Bridge City is a privy or successor in interest to the City of Orange or Port Neches. There is *nothing* in the record to support either implication and the trial judge made no such findings. Thus, *Res Judicata* has been applied to a "stranger" to the earlier judgment who had no day in court (and could not have in 1970).

Moreover, the Jefferson County District Attorney filed a Quo Warranto action in Orange County against an Orange County resident (Bridge City) involving Orange County tracts of land. Only a proper Quo Warranto officer may bring a Quo Warranto action in the proper county. The Texas Civil Practice & Remedies Code provides: "the Attorney General, or the County Attorney, or District Attorney of the proper county may bring a Quo Warranto action in the District Court of the proper county." In addition, the Texas Constitution provides that where there is no District Attorney (as in Orange County), the County Attorney "shall" represent the state in all cases in the District Courts in their respective counties. Therefore, the only Quo Warranto officers that could properly have been involved at bar were the Texas Attorney General and the Orange County Attorney. Texas courts at bar allowed *another* person, (the District Attorney of Jefferson County) to bring the Quo Warranto action, contrary to Texas law as well as the Texas Constitution. Any judgment rendered in accordance therewith should have been deemed *void abinitio.*

Access to the courts is a constitutional right guaranteed by the "due process clause" of the Fifth and Fourteenth Amendments. This constitutional right of access to the courts cannot be infringed upon or burdened. A trial court may not penalize a party for taking a successful appeal by taxing him for attorney's fees if he takes such action. A trial court must condition the fee award to an

unsuccessful appeal.

Port Arthur litigated two claims below, a Quo Warranto action and a Declaratory Judgment action. Attorney's fees are not recoverable in Quo Warranto actions, but are recoverable in a Declaratory Judgment action. Port Arthur did not segregate their fees between those generated on the Quo Warranto action and those generated on the Declaratory Judgment action. When a claim where attorney's fees are *not* recoverable is combined with one where fees *are* recoverable, it is incumbent upon the parties asserting those causes to segregate their attorney's fees. Furthermore, a Declaratory Judgment action is improper and should not be entertained where there is another action (i.e., a Quo Warranto action), pending between the same parties and should not be used solely to obtain attorney's fees.

Additionally, Bridge City Ordinance IX-42 contained a "savings clause". Port Arthur admitted that part of the tract annexed in Ordinance IX-42 is outside its claimed extra-territorial jurisdiction. Since at least part of the tract annexed by Ordinance IX-42 is outside the claim of Port Arthur's extra-territorial jurisdiction and because of the savings clause, Ordinance IX-42 cannot be void in its totality. Furthermore, the conditional language of the savings clause most certainly implies an intent to exclude the annexation of territory over which Bridge City does not have jurisdiction.

The Texas courts' actions violate Petitioner's right to "due process of law" pursuant to the Fourteenth Amendment.

The trial court unconditionally awarded $30,000.00 in appellate fees against Bridge City. This penalty (which was enacted to discourage exercise of constitutional rights of access to the courts) resulted in an "excessive fine"

contrary to the Eighth Amendment. The unconditional award of appellate attorney's fees is an "excessive fine" proscribed by the Eighth Amendment.

Finally, the Texas courts have applied the law differently to Bridge City than to others similarly situated. By doing so, Bridge City's Fourteenth Amendment right of "equal protection was violated.

ARGUMENT AND AUTHORITIES

I.

THE TEXAS SUPREME COURT VIOLATED THE "DUE PROCESS CLAUSE" OF THE FOURTEENTH AMENDMENT.

A.

GENERALLY

The United States Constitution is the supreme law of the land. *Florida v. Mellon*, 273 U.S. 12, 17 (1927). Constitutional provisions must be given full force and effect throughout the Union. *King v. Mullins*, 171 U.S. 404, 422 (1898). The federal Constitution, and laws enacted thereunder, prevail over the laws of a State. *Florida v. Mellon, supra.* The power of the states to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment, *Shelly v. Kraemer*, 334 U.S. 1, 22, (1948), providing that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of . . . property, without due process of law . . .* " Due process is not measured by a yardstick of personal reaction or the sphygmorgram of the most

sensitive person, but by that whole community sense of "decency and fairness" woven by common experience into the fabric of acceptable conduct. *Breithaupt v. Abram*, 352 U.S. 432, 451 (1956). That the action of state courts and of judicial officers in their official capacities is to be regarded as "action of the State" within the meaning of the Fourteenth Amendment, is a proposition long established at bar. *Shelley v. Kraemer*, 334 U.S. 1, 15 (1947).

The Texas Supreme Court, (as did the Court of Appeals' majority and the trial court) not only have violated the "due process" guarantee of the Fourteenth Amendment but also the "due course of law" provision of the Texas Constitution. Article 1, § 19 of the Texas Constitution provides: "*No citizen of this state shall be deprived of . . . property*, privileges or immunities, or in any manner disenfranchised, *except by the due course of law of the land.*" (Emphasis added). Section 19 of the Texas Bill of Rights is a "due process of law provision" included in all Texas Constitutions. A law is unconstitutional as violating due process when it is arbitrary or unreasonable. TEX. CONST. ANN. art. I, §19, interp. commentary (Vernon 1984). The "due course of law" clause of the Texas Constitution applies the same restrictions as imposed by the "due process" guarantee of the Fourteenth Amendment. *Mellenger v. City of Houston*, 3 S.W. 249 (Tex. 1887). The Texas Courts violated Bridge City's right to "due process" afforded by the Fourteenth Amendment.

B.

RES JUDICATA WAS MISAPPLIED BY TEXAS COURTS

In 1970, Port Arthur and others acquired — admittedly without litigation — an "Agreed Judgment" from a Jefferson County District Court. This "Agreed Judg-

ment" purported to establish the predominance of Port Arthur's extra-territorial jurisdiction in the general area now in dispute to the exclusion of the cities of Orange and Port Neches. *After the 1970 "Agreed Judgment" became final,* Bridge City was incorporated. In 1988, Bridge City adopted Annexation Ordinances IX-42 and IX-43. Port Arthur claimed that said Ordinances partially encroached upon its claimed extra-territorial jurisdiction and filed suit to declare the ordinances void. Port Arthur relied heavily (as did the trial court, and Court of Appeals majority, and presumably the Texas Supreme Court) on the 1970 "Agreed Judgment" as *Res Judicata. Res Judicata* — the basis for the state court judgments below — is inapplicable, inappropriate, and wrongfully applied to Bridge City. The use of this doctrine as applied to the facts at bar is contrary to well-settled law.

Res Judicata principles apply equally to the state and private litigants. *See, e.g., State Ex Rel. City of Colleyville v. City of Hurst*, 519 S.W.2d 98, 701 (Tex. Civ. App. - Ft. Worth, 1975, writ ref'd n.r.e.). Further, *Res Judicata* is to be applied narrowly and with caution. *Westinghouse Credit Corp. v. Kownslar*, 496 S.W.2d 531, 532 (Tex. 1978); *Fuqua v. Fuqua*, 750 S.W.2d 238, 244 (Tex. App. - Dallas 1988, writ den.); *Jeanes v. Hamby*, 685 S.W.2d 695, 699 (Tex. App. - Dallas 1984, writ ref'd n.r.e.). It does not apply where time changes facts or new facts emerge. As the Texas Supreme Court recently reiterated: "Our past decisions do make clear . . . that *a judgment in one suit will not operate as Res Judicata . . . where,* in the interval, *the facts have changed or new facts have occurred* which may alter the legal rights or relations of the parties." *Marino v. State Farm Fire & Cas. Ins. Co.*, 787 S.W.2d 948, 949-950 (Tex. 1990) (Emphasis added); *City of Lubbock v. Stubbs*, 327 S.W.2d 411, 414 (Tex. 1959). Stated another way, "a judgment is *Res Judicata* only of (then) present and not future conditions." *Cowling v. Colligan*, 312 S.W.2d 943, 947

(Tex. 1958)

A material and substantial change of facts occurred AFTER entry of the 1970 "Agreed Judgment" and new facts emerged — precluding *Res Judicata* for the 1970 "Agreed Judgment". As was aptly stated by Justice Burgess in his dissent: "Bridge City did not exist at the time of the prior [1970 "Agreed"] Judgment. This alone is a new or changed fact." *City of Bridge City v. City of Port Arthur*, 792 S.W.2d 217, 236 (Tex. App. - Beaumont 1990, writ denied). Incorporation of Bridge City after the 1970 "Agreed Judgment" is certainly a "future condition."

In addition, the 1970 "Agreed Judgment" cannot operate as *Res Judicata* at bar unless the prior suit and this one are IDENTICAL as to causes, issues, and parties. *Byrom v. Pendley*, 717 S.W.2d 602, 606 (Tex. 1986); *Bonniwell v. Beech Aircraft*, 663 S.W.2d 816, 818 (Tex. 1984). Since Bridge City did not even exist at the time of the 1970 "Agreed Judgment," it is axiomatic that the "element of identical parties" is not met!

Thus, *Res Judicata* has been applied to a "stranger" to the earlier judgment who had NO DAY in court (and could not have in 1970). *See, e.g., Jack v. Jack*, 796 S.W.2d 543 (Tex. App. - Dallas 1990, no writ); *McClendon v. State Farm Mutual Ins. Co.*, 796 S.W.2d 229 (Tex. App. - El Paso 1990, writ den.)

No one disputes the fact that Bridge City was *not* a party to the 1970 suit. Thus, the Texas Courts must be implying that Bridge City is a privy (or successor in interest) to the City of Orange or that of Port Neches, both parties in 1970. There is nothing in the record to support such and the trial court made no such findings.

The foundation for the state court judgments below

was *Res Judicata*. The burden was on Port Arthur to plead and prove such. Port Arthur introduced into evidence *only* the prior (1970) Judgment — *none* of the prior pleadings or record. The Texas Supreme Court observed years ago: "consideration must be given to the [prior] pleadings in testing what was involved and determined in the former suit." *Davis v. First Nat'l Bank of Waco*, 161 S.W.2d 467, 471 (Tex. 1942); *Poth v. Roosth*, 202 S.W.2d 442, 445 (Tex. 1947) (policy to "look carefully at the [prior] pleadings . . . to determine the scope and meaning of [the prior judgment]"). Port Arthur's failure to introduce the prior pleadings rendered it *impossible* for the courts below to "test what was involved and determined in the former suit", let alone determine the "scope and meaning" of the prior judgment. Port Arthur failed to carry its own *Res Judicata* burden. The Texas Courts misapplication of *Res Judicata* to Bridge City resulted in not only a violation of Bridge City's Fourteenth Amendment right to "due process of law" and also a violation of Bridge City's right to "due course of law" per Art. I, § 19 of the Texas Constitution.

C.

THE QUO WARRANTO ACTION WAS BROUGHT BY AN IMPROPER PARTY NOT AUTHORIZED BY TEXAS STATUTORY LAW NOR THE TEXAS CONSTITUTION AND TO BRING SUCH AN ACTION AGAINST PETITIONER IN THIS MANNER WAS A VIOLATION OF DUE PROCESS OF LAW

The Jefferson County District Attorney filed a Quo Warranto action in Orange County against an Orange County resident (Bridge City) involving Orange County tracts of land. Only a proper Quo Warranto officer may bring a Quo Warranto action in the proper county.

Texas law provides: "*The Attorney General, or the County Attorney or District Attorney of the proper county . . . may bring a Quo Warranto action in* the District Court *of the proper county . . .*" TEX. CIV. PRAC. REM. CODE ANN. § 66.002(a) (Vernon 1986). (Emphasis added). In addition, TEX. CONST. art V, § 21 provides that where there is no District Attorney (as in Orange County) "the County Attorney shall represent the State in all cases in the District Courts . . . in their respective counties." The Texas Legislature also limited the Jefferson County District Attorney's authority to actions in the Jefferson County judicial system. The Texas Government Code only authorizes the Jefferson County District Attorney to "represent the state in any matters before *those courts*," especially referring to the Jefferson County District and inferior courts. TEX. GOV'T CODE ANN. § 44.223(b) (Vernon 1988), Section 44.223(a) of the Texas Government Code only authorizes the District Attorney of Jefferson County to represent *Jefferson County* in any county in which the county has pending business; *Jefferson County is not and never has been a party to the action, and the District Attorney admitted the county had no pending business in the case*! (Pre-Trial Motion, S.F. 23). The only Quo Warranto officers that could properly have been involved in this case were the Texas Attorney General and the Orange County Attorney — both of whom refused to bring such an action; they could not be compelled to do so. A proper Quo Warranto officer of the proper county may not be compelled to bring a Quo Warranto action, but may do so or not as matter of discretion. *See, for example, McDannald v. Attorney General John Hill*, 438 F. Supp. 785, 788 (S.D. Tex. 1977), *aff'd*, 575 F.2d 880 (5th Cir. 1978); *State ex rel. Engle v. City of San Antonio*, 474 S.W.2d 28-29 (Tex. Civ. App. 1971, writ ref'd n.r.e.); *State ex rel. Bennett v. Clarendon I.S.D.*, 298 S.W.2d 111, 117 (Tex. 1957).

For the trial court to allow any *other* person,

including the District Attorney of Jefferson County, to bring the Quo Warranto action violates Texas' statutory law as well as that state's Constitution and any judgment rendered in accordance therewith should have been deemed *void abinitio.* Furthermore, the Texas courts' acquiescence to the Jefferson County District Attorney bringing the Quo Warranto action was a violation of Petitioner's rights of "due process" and "due course of law."

D.

THE UNCONDITIONAL AWARD OF $30,000.00 IN APPELLATE ATTORNEY'S FEES AGAINST PETITIONER WAS AN INFRINGMENT UPON PETITIONER'S RIGHT OF ACCESS TO THE COURTS

The Trial Court admitted attorney's fees evidence over objection (S.F. 122-3) and awarded attorney's fees to Port Arthur (Tr. 541-542). The Trial Court's judgment provided that "Port Arthur shall recover from Bridge City $86,089.25 in attorney's fees with remittitur as follows: $30,000.00 if no appeal is prosecuted in the Court of Appeals; $15,000.00 if no application for a writ of error is prosecuted; and $5,000.00 if writ of error is not granted by the Texas Supreme Court." (Tr. 541-2; 531 — Findings of Fact 55-8, 533 — Conclusions of Law - 66-67).

Access to the courts of the United States is a constitutional right guaranteed by the due process clause of the Fifth and Fourteenth Amendments. *Silver v. Cormier,* 529 F.2d 161, 163 (10th Cir. 1976). The constitutional right of access to the courts cannot be infringed upon or burdened. *Silver, Id,* at 163.

It is well-settled that: "a trial court may not penalize a party for taking a successful appeal by taxing him with attorney's fees if he takes such action. Therefore, the trial

court must condition the award of attorney's fees to an appellee upon appellant's unsuccessful appeal. *An unconditional award of appellate attorney's fees is improper.*" *Siegler v. Williams*, 658 S.W.2d 236, 241 (Tex. App. - Houston [1st Dist.] 1983, no writ) (reversing an unconditional fees award). *See, also, Weaver v. King Ready Mix Concrete Company, Inc.*, 750 S.W.2d 913, 916 (Tex. App. - Waco 1988, no writ) (reversing an unconditional fees award); *King Optical v. Auto. Data Processing*, 542 S.W.2d 213, 218 (Tex. Civ. App. - Waco 1976, writ ref'd n.r.e.), (wherein the court held that the award of attorney's fees in the event of appeals by appellant are unconditional and do not purport to determine whether or not appellant succeeds, such awards are improper). Therefore, the award of unconditional appellate attorney's fees by the trial court against Bridge City (affirmed by the majority of the Beaumont Court of Appeals and the Texas Supreme Court) violated Bridge City's right of "due process of law" under the United States Constitution and "due course of law" under the Texas Constitution.

E.

THE UNSEGREGATED ATTORNEY'S FEES AWARD WAS IMPROPER UNDER TEXAS LAW AND THE EXCEPTION WAS INAPPLICABLE

Respondents litigated two claims below, a Quo Warranto action and a Declaratory Judgment action. Attorney's fees are not recoverable in Quo Warranto actions (to which the Beaumont Court of Appeals majority agreed and against which Port Arthur filed no objection), BUT attorney's fees are recoverable in a Declaratory Judgment action. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009, (Vernon 1986). Respondents did not segregate their fees between those generated on the Quo Warranto action and those generated on the Declaratory Judgment action.

When a claim where a fee award is not recoverable is combined with one where an award is recoverable, it is incumbent upon the party asserting those causes to segregate their attorney's fees between claims. *Kosberg v. Brown*, 601 S.W.2d 414, 418 (Tex. App. - Houston [14th Dist.] 1980, no writ) (reversing unsegregated fee award). The Court of Appeals itself stated on a prior occasion: "*Until* and unless [the parties seeking fees] segregated its attorney's fees, it offered no evidence supporting allowance thereof." *American National Bank & Trust Co. v. First Wisconsin Mortgage Trust Co.*, 577 S.W.2d 312, 320 (Tex. Civ. App. - Beaumont 1979, writ re'f n.r.e.). (Emphasis added).

Port Arthur asserted that a corollary or exception to this rule is that services for which reasonable attorney's fees may be awarded includes those rendered in connection with all claims, even if recovery of attorney's fees is not authorized for such claims, if they arise out of the same transaction and are so interrelated that their prosecution or defense entails proof or denial of essentially the same facts. *Wilkins v. Baines*, 615 S.W.2d 314, 316 (Tex. App. - Dallas 1981, no writ); *Williamson v. Tucker*, 615 S.W.2d 881 (Tex. App. - Dallas 1981, writ ref'd n.r.e.); *Triland Invest Group v. Warren*, 742 S.W.2d 18 (Tex. App. - Dallas 1987) *rev'd on other grounds* 779 S.W.2d 808 (1989).

The Court of Appeals majority stated that the Declaratory Judgment action and the Quo Warranto action were so interwined and interrelated as to "defy" segregation of attorney's fees, 792 S.W.2d 217, 228 (Appendix D). This is simply not so.

When a lawsuit mixes claims where attorney's fees are and are not recoverable, it only takes a few moments of an attorney's time to review the time sheet and determine what amount of time was spent on the claim where fees are

recoverable and what amount of time was spent on the claim that fees are not. Public policy dictates that attorneys zealously represent their clients in an efficient manner. Furthermore, a Declaratory Judgment action is improper and should not be entertained where there is another action, e.g., a Quo Warranto action, pending between the same parties and should not be used solely to obtain attorney's fees. *Texas Liquor Control Board v. Cannon Creek Land Corp.*, 456 S.W.2d 891, 895 (Tex. 1970); *John Chezik Buick Co. v. Friendly Chevrolet Co.*, 749, S.W. 2d 591, 594-595 (Tex. App. - Dallas 1988, writ den.).

When Port Arthur filed its initial suit and then added the Quo Warranto action, the relief sought at all times thereto was not to determine which City had jurisdiction over certain property but to invalidate Bridge City's annexations. Even if the Declaratory Judgment and Quo Warranto actions could co-exist, the attorney's fee award should be disallowed because the fees were not segregated. The failure of the Texas Courts to require Port Arthur to segregate its attorney's fees and the award of such unsegregated attorney's fees was a violation of Bridge City's Fourteenth Amendment rights to "due process" and rights to "due course of law" under Art. I, § 19 of the Texas Constitution.

F.

THE INVALIDATION OF PETITIONER'S SAVINGS CLAUSES TO PETITIONER'S ANNEXATION ORDINANCE AMOUNTED TO AN UNLAWFUL TAKING OF PROPERTY

The Fourteenth Amendment § 1 states that: "*No state shall deprive any person of* life, liberty, or *property, without due process of law . . . .*" Bridge City ordinances IX-42 and IX-43 both contain "savings clauses": "if the

taking of any territory annexed by this ordinance is declared by a court . . . to be invalid or illegal, it shall not affect the balance of the property annexed and attempted to be annexed, and that property shall remain as part of Bridge City." Port Arthur admitted, as did its Engineer (S.F. 81), that part of the tract annexed in Ordinance IX-42 is *outside* Port Arthur's claimed extra-territorial jurisdiction. As at least part of the tract annexed by Ordinance IX-42 is *outside* the claim of Port Arthur's extra-territorial jurisdiction *and* because of the savings clause, Ordinance IX-42 cannot held to be void *in toto*, as erroneously ruled by the trial court (affirmed by the Court of Appeals majority, and the Texas Supreme Court).

The Beaumont Court of Appeals majority determined that the "savings clause" was ineffective because it: "expresses no intent to exclude for annexation territory over which . . . [Bridge City] does not have jurisdiction. Howbeit, the conditional language of the savings clause most certainly implies such intent. Examples of quite similar "savings clauses" illuminate the error *See, City of Houston v. Savely*, 708 S.W.2d 879, 887 (Tex. App. - Houston [1st Dist.] 1986, writ ref'd n.r.e.), *cert. denied*, 482 U.S. 928 (1987) (reversing judgment that ordinance was void and rendering judgment that ordinance was valid based on savings clauses); *City of Houston v. Harris County Eastex Oaks Water & Sewer Dist.*, 438 S.W.2d 941 (Tex. Civ. App. - Houston [1st Dist.] 1969, writ ref'd n.r.e.) (vacating permanent injunction reversing and rendering trial court determination ordinance was void, based on savings clause).

Texas law does not require use of the word "intent" to have a valid "savings clause." *See, e.g., Harris County Eastex Oaks Water & Sewer Dist., Id.*, at 949, (court gave effect to a savings clause absent the word "intent"). Furthermore, the conditional language of Bridge City's sav-

ings clauses to its annexation ordinances clearly imply such intent.

The declaration that the entire annexation ordinance was void constituted an unlawful taking of property lawfully annexed to Bridge City and was, thus, a violation of Bridge City's Fourteenth Amendment right to "due process of law" and right to "due course of law" under the Texas Constitution.

II.

THE UNCONDITIONAL AWARD OF APPELLATE ATTORNEY'S FEES AGAINST PETITIONER WAS A VIOLATION OF THE EIGHTH AMENDMENT'S GUARANTEE AGAINST EXCESSIVE FINES

A Trial Court may not penalize a party for taking a successful appeal by taxing him with attorney's fees if he takes such action. *See, Seigler, Weaver,* and *King Optical, supra.* Therefore, a Trial Court must condition the award upon appellant's unsuccessful appeal. An unconditional award of attorney's fees is improper. The Trial Court at bar unconditionally awarded $30,000.00 in appellate fees. Such action, in effect, acted as a penalty against Bridge City if it chose to exercise its right of appeal.

As this Court in *Silver v. Cormier,* stated, the constitutional rights of access to the courts cannot be infringed upon or burdened. Therefore, the penalty against Bridge City which was enacted to discourage it from exercising its constitutional right of access to the appellate courts resulted in an "excessive fine" contrary to the Eighth Amendment and Art. I, § 13 of the Texas Constitution.

The Eighth Amendment provides: "Excessive bail

shall not be required *nor excessive fines imposed,* nor cruel or unusual punishments inflicted." Furthermore Art. I, § 13 of the Texas Constitution provides: "Excessive bail shall not be required, *nor excessive fines imposed,* nor cruel or unusual punishment inflicted. *All courts shall be open. . . and every person . . .* and *shall have remedy by due course of law.*" Through the action of the Fourteenth Amendment, the Eighth Amendment to the United States Constitution applies to the states. *Washington v. Lee,* 263 F. Supp. 327 (M.D. Alabama, 1966), *aff'd,* 390 U.S. 333 (1968).

Both the Eighth Amendment and the Texas Constitution prohibit excessive fines. A penalty infringing upon and thus burdening the access to the courts most certainly is an excessive fine and thus unallowable.

In addition, the Texas Constitution (Art. I, § 13) requires that "all courts shall be open." This provision is based largely upon the Magna Charta (Chapter 40: "to none will we sell, to none deny or delay, right or justice.") In a free government it can be said that the doors of litigation are wide open and constantly must remain so. TEX. CONST. art. I § 13, interp. commentary (Vernon 1984). As shown above, the unconditional award of appellate attorney's fees against petitioner is an excessive fee as proscribed by the Eighth Amendment and Article I, § 13 of the Texas Constitution.

III.

THE TEXAS COURTS HAVE VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BY APPLYING TEXAS LAW DIFFERENTLY TO PETITIONER THAN TO OTHERS SIMILARLY SITUATED

The Fourteenth Amendment states "No state shall

deny to any person within its jurisdiction the equal protection of the laws." The "Equal Protection Clause" essentially requires that all persons similarly situated be treated alike. *Mahone v. Atticks Utility District of Harris County,* 836 F2d 921, 932 (5th Cir. 1988). This is not achieved through the indiscriminate imposition of inequalities. *Shelley v. Kraemer,* 334 U.S.1,22 (1948). Additionally, Article I, § 3 of the Texas Constitution, states: "[a]ll free men, when they form a social compact, have equal rights. . ."

All Texas constitutions have contained provisions guaranteeing to all persons equality of rights, the terminology used in Article I, §3 being a re-adoption of the same language of Article I, §2 of the Constitutions of 1845, 1861, and 1866. "Equality of rights" is a concept of republicanism, indigenous to America, finding first expression in the Declaration of Independence. Section 3 of Article I, sets forth two meanings of equality: that of equal protection of the laws, and that of political equality. Tex. Const. Art. I, §3, interp. commentary, (Vernon 1982).

Justice Field artfully described the principle of "equal protection of the laws" in *Barbier v. Connelly,* 113 U.S. 27 (1885), when he declared:

> That *equal protection* and security *should be given to all under like circumstances* in the enjoyment of their personal and civil rights; *that all persons should be equally entitled to* their happiness and *acquire and enjoy property; they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs* and enforcement of contract; *that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burden should be*

> *laid upon one than are laid upon others in the same calling and conditions,* and in the administration of criminal justice no different or higher punishment should be imposed upon one done such as prescribed to all for like offenses.

(Emphasis added).

As seen above, the Texas Courts applied Texas law differently to Bridge City than to others similarly situated and by so doing violated Bridge City's right to "equal protection" under the Fourteenth Amendment and right to "equal rights" under Article I, §3 of the Texas Constitution.

CONCLUSION

The Texas Courts have violated Bridge City's right to "due process of law":

> (1) by mis-applying settled Texas Law regarding *Res Judicata;*
>
> (2) by allowing an improper party not authorized by Texas law nor the Constitution to bring a Quo Warranto action;
>
> (3) by an unconditional award of appellate attorney's fees;
>
> (4) by an unsegregated attorney's fee award; and
>
> (5) by invalidating Bridge City's saving clauses to its annexation ordinances which amounted to an unlawful taking of property.

Texas Courts at bar also violated the Eighth Amendment's guarantee of protection against "excessive fines" by penalizing Bridge City for exercising its constitutional

right of access to the Courts. Furthermore, the Texas Courts violated the "Equal Protection Clause" of the 14th Amendment by applying Texas Law differently to Bridge City than to others similarly situated.

As this Court observed in *Shelley v. Kraemer*, the task of determining whether the action of a State offends constitutional provisions is one which may not be undertaken lightly. Where it is clear that the action of the State violates the terms of the fundamental charter [as it is in the present case], it is the obligation of this Court so to declare. *Shelly v. Kraemer* at p.23.

PRAYER

WHEREFORE PREMISES CONSIDERED, Petitioner prays that the Petition for Certiorari be granted and that the judgment of the Texas Supreme Court be reversed and remanded for proper trial below and that costs be awarded against Respondent.

Respectfully submitted,

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& Apffel, P.C.

By: _____

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ATTORNEYS FOR PETITIONER
CITY OF BRIDGE CITY, TEXAS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to all counsel of record on this ____ day of ____, 1991.

_____

Otto D. Hewitt, III

APPENDIX A

THE SUPREME COURT OF TEXAS

P. O. Box 12248
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Austin, Texas 78711
John T. Adams, Clerk

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RE: Case No. D-0205
Style: CITY OF BRIDGE CITY, TEXAS
v. STATE OF TEXAS, EX REL. CITY OF PORT ARTHUR, TEXAS ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,
John T. Adams, Clerk

by /s/ Blanca E. Morin
Blanca Morin, Deputy

APPENDIX B

THE SUPREME COURT OF TEXAS

P. O. Box 12248
Supreme Court Building
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John T. Adams, Clerk

October 31, 1990

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RE: Case No. D-0205
Style: CITY OF BRIDGE CITY, TEXAS
v. STATE OF TEXAS, EX REL. CITY OF PORT ARTHUR, TEXAS ET AL.

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Sincerely,
John T. Adams, Clerk

by /s/ Courtland Crocker
Courtland Crocker, Deputy

APPENDIX C

COURT OF APPEALS
NINTH DISTRICT OF STATE OF TEXAS
1001 PEARL, SUITE 330
BEAUMONT, TEXAS 77701
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SHIRLEY FORREST, CLERK

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RE: CASE NO. 09-89-00053-CV TRIAL COURT
CASE NO. B-880,738—Cr

STYLE: City of Bridge City
v; State of Texas, on the Relation of City of Port Arthur

The Appellant's Motion for Rehearing in the above styled and numbered cause wass overruled this date.

Respectfully yours,

SHIRLEY FORREST, CLERK

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APPENDIX D

CITY OF BRIDGE CITY,

Appellant,

v.

The STATE of Texas, ex rel.
CITY OF PORT ARTHUR, et al.,

Appellees.

No. 09-89-053 CV.

Court of Appeals of Texas,
Beaumont,

June 14, 1990.

As Corrected June 18, 1990.

Rehearing Denied July 10, 1990.

City and others challenged proposed annexation of tracts of land by another city, by way of actions in quo warranto and for declaratory judgment. The 163rd District Court, Orange County, Arthur C. Lesher, J., entered judgment against city attempting annexation, and that city appealed. The Court of Appeals, Walker, C.J., held that: (1) previous quo warranto proceeding had res judicata effect; (2) attorney fees were properly awarded; (3) savings clause in annexation ordinances did not empower lower court to redraft ordinance to define what territory was intended to be annexed; and (4) evidence supported determination that tracts of land sought to be annexed were within extraterritorial jurisdiction of city challenging annexation.

Affirmed.

Brookshire, J., filed separate concurring opinion.

Burgess, J., filed dissenting opinion.

H.D. Pate, Bridge City, Otto D. Hewitt, III, Kenneth Bower, McLeod, Alexander, Powel & Apffel, Galveston, for appellant.

H.P. Wright, Wright & Pitre, Port Neches, Doyle Curtis, City of Port Arthur, Earl Black, James M. Black, Black & Black, Port Arthur, Thomas F. Rugg, Asst. Dist. Atty., Beaumont, Robert Q. Keith, Keith & Keith, Johnson City, William E. Heaner, Jr., Gulf States Utilities Co., Beaumont, for appellees.

OPINION

WALKER, Chief Justice.

This is an appeal from a bench trial held in the 163rd District Court in and for Orange County. Visiting Judge, Arthus C. Lesher, Jr. of Houston was appointed to try this case. After a trial on the merits, a judgment adverse to the defendant, City of Bridge City, appellant herein, was entered on January 27, 1989 along with finding of fact and conclusions of law. The trial judge found that the Bridge Ciry Ordinances IX-42 and IX-43 were void ab initio and awarded attorney's fees to the City of Port Arthur in the amount of $86,089.85 with certain remittiturs to be triggered by subsequent appeal decisions by the appellant. This Court feels it necessary to present some degree of detail as to the factual history of this case.

The City of Port Arthur, the appellee, (hereafter referred to as Port Arthur) was originally incorporated on

May 18, 1898 by act of the Texas Legislature and has been a home rule city continuously since March 8, 1932. Appellee, Port Arthur is domiciled in Jefferson County, Texas according to the evidence and the findings of fact made by the trial court.

In 1913 the City of Port Arthur annexed an area on the east side of the Neches River for the limited purpose of establishing a navigation territory pursuant to TEX. REV.CIV.STAT.ANN. art. 1183 (Vernon 1963). From 1950 through 1961, the City of Port Arthur adopted a series of nine annexation ordinances which established its relevant corporate boundary as being the centerline of the Neches River and such annexations included portions of the limited navigation territory. Since 1961 the corporate boundaries of Port Arthur have been the centerline of the Neches River and the limited navigation territory extended along and 2,500 feet east of the certerline of the Neches River in Orange County.

On August 23, 1963, Port Arthur's extra-territorial jurisdiction became effective. TEX.REV.CIV.STAT.ANN. art. 970a (Vernon 1963), *repealed by* Acts 1987, ch. 149, sec. 49(1), 1987 Tex.Gen. and Spec.Laws 707, 766, (now located at TEX.LOCAL GOV'T CODE ANN. sec. 42,001 (Vernon 1988). The old art. 970a was entitled "Municipal Annexation Act". The Municipal Annexation Act established that cities with population in excess of 50,000 but less than 100,000 shall have an extraterritorial jurisdiction of three and one-half (3½) miles from its corporate boundaries. Port Arthur's population since 1960 has been above 57,000 which fixes Port Arthur's extraterritorial jurisdiction at three and one-half (3½) miles beyond the corporate limits of the city.

The Sabine Power Station of Gulf States Utilities Company is located on land that is partially within the

three and one-half (3½) mile extraterritorial jurisdiction of the City of Port Arthur as established in 1963 under the Municipal Annexation Act and Judicially affirmed in the 1970 judgment in Cause No. B-77,678 in the 60th Judicial District Court of Jefferson County, Texas. In 1970, pursuant to sec. 3C of art. 970a of the Municipal Annexation Act, Gulf States Utilities petitioned the City of Port Arthur to include the entirety of its Sabine Station Power Plant within the extraterritorial jurisdiction of the City of Port Arthur. Such requests was granted by the City of Port Arthur and parties entered into an industrial district agreement which is also provided for in the Municipal Annexation Act, TEX.REV.CIV.STAT.ANN. art 970a, sec, 5 (Vernon 1963). The City of Port Arthur receives 1.25 million dollars per year under this industrial district agreement.

On January 5, 1988, by Ordinance IX-42, Bridge City purported to annex territory lying partially within the extraterritorial jurisdiction of Port Arthur. Then on August 2, 1988, by Ordinance IX-43, Bridge City purported to annex land lying wholly within the extraterritorial jurisdiction of Port Arthur and which included the Gulf States Sabine Power Station. On August 4, 1988, the City of Port Arthur made written request that Bridge Ciry rescind Ordinance IX-43. However, at trial both Ordinances IX-42 and IX-43 were referred to as void. The record before us reveals that no response to this requests was made by Bridge City and thereafter Port Arthur gave Bridge City notice of its claim that Ordinances IX-42 and IX-43 were void because they attempted to annex territory in Port Arthur's extraterritorial jurisdiction. Again, Bridge City did not respond and then Port Arthur filed suit for declaratory judgment that Bridge City Ordinances IX-42 and IX-43 are void.

Appellant, Bridge City, filed a plea in abatement asserting (1) that Gulf States Utilities was a necessary

party and; (2) that the proceeding must be filed as a quo warranto action. Gulf States Utilities Company intervened. However, the Attorney General for the state of Texas and the Orange County Attorney refused and/or declined to file the quo warranto action. The Criminal District Attorney of Jefferson County filed a petition for leave to file information in quo warranto. The trial court granted leave to file the information in quo warranto and appellant, Bridge City, then filed a motion to show authority alleging that the Criminal District Attorney of Jefferson County lacked authority to file the quo warranto proceeding. After hearing the evidence and argument of counsel, the trial court overruled Bridge City's motion. Upon trial and entry of judgment, notice of appeal was timely filed and the recored was placed before this Court in a timely manner.

In the trial court, the Honorable Arthur C. Lesher, Jr. found that the Bridge City Ordinances IX-42 and IX-43 were void ab initio and awarded attorney's fees to the City of Port Arthur.

Appellant brings to this Court eleven points of error. Point of error number one contends that the trial court erred and abused its discretion in entering findings of fact and conclusions of law and in entering judgment against appellant, holding that res judicata or collateral estoppel bound appellant to a 1970 agreed judgment because neither res juidicata nor collateral estoppel was applicable.

It is clear that the trial court did not differentiate between the doctrines of collateral estoppel or res judicata and did not specifically use either of those terms in the findings of fact or the conclusions of law. In order to determine what the trial court did will necessitate a review of the trial court's findings of fact and conclusions of law which may or may not relate to the two doctines in question.

We regret our lengthy rendition of the findings of facts and conclusions of law, however, we feel it necessary for a clearer understanding of this matter. The trial court made the following findings of fact and conclusions of law which appellant contends that neither res judicata nor collateral estoppel apply:

FINDING OF FACT NUMBER 13: Port Arthur's extraterritorial jurisdiction extended three and one-half miles from its boundary to the east.

FINDING OF FACT NUMBER 14: Port Arthur's extraterritorial jurisdiction overlapped with that of the City of Orange.

FINDING OF FACT NUMBER 15: The case styled B-77,678 *State of Texas Ex. Rel. City of Orange v. City of Port Neches, et al,* in the 60th District Court of Jefferson County, Texas hereinafter shown as B-77,678 was a proceeding brought by the Criminal District Attorney (S/A) of Jefferson County, Texas in the name of the State of Texas as an information in quo warranto.

FINDING OF FACT NUMBER 16: Port Arthur was an intervening relator in#B-77,678.

FINDING OF FACT NUMBER 17: The Criminal District Attorney of Jefferson County and Port Arthur obtained a judgment in # 77,678 which pertinent hereto provided:

> (6) Pursuant to the Municipal Annexation Act, Article 970a, V.A.T.S., the present extraterritorial jurisdiction of the City of Port Arthur extends for a distance of three and one-half (3½) miles from the corporate limits of the City of Port Arthur as established by its Ordinance Nos. 2530, 2540 and 2738, all of which were plead by caption in Port Arthur's amended information in the nature of a quo warranto, free and clear of any municipal jurisdiction or extraterritorial claims

> of the City of Orange or *any other municipality of the State of Texas,* which three and one-half (3½) miles encompasses substantially all of Gulf States Utilities Company's Sabine Station: and that Gulf States Utilities Company, pursuant to the Municipal Annexation Act, and the release by the city of Orange of all extraterritorial claims thereto, has petitioned the City of Port Arthur to include in its extraterritorial jurisdication all of the property of Gulf States Utilities Company known as Sabine Station . . . is therefore included within the extraterritorial jurisdiction of the City of Port Arthur, so as to place all of Gulf States Utilities Comapny's property designated as Sabine station, aforesaid, within the exclusive extraterritorial jurisdiction of one municipality, whether or not said property described in Exhibit "A" is located, in its entirety, within three and one-half (3½) miles from the corporate limits of the City of Port Arthur; (emphasis added)

FINDING OF FACT NUMBER 18: No motion for new trial, notice of appeal, appeal bond, or appeal was filed after judgment was entered April 22, 1970 in #B-77,678.

FINDING OF FACT NUMBER 19: Judgment in #B-77,678 became final on May 22, 1970.

FINDING OF FACT NUMBER 20: In 1959 Port Arthur first entered into an "industrial district contract" with the Atlantic Refining Co. This contract related to an area within the 1913 limited annexation territory (see finding #6 above) on the west side of the Neches River.

FINDING OF FACT NUMBER 21: On August 22, 1963 the area included within the Atlantic Refining Co. boundaries described above became a part of the extraterritorial jurisdiction of Port Arthur.

FINDING OF FACT NUMBER 22: Since August 22, 1963, (#21 above) such area has been designated as an industrial district and Port Arthur has contracted with the then owners of an oil refinery located within such industrial district. Local Government Code Sect. 42.044.

FINDING OF FACT NUMBER 23: In 1970, and at all times thereafter, the Gulf States Utilities Company Sabine Power Plant has been present within the extraterritorial jurisdiction of Port Arthur described in the judgment in #B-77,678.

FINDING OF FACT NUMBER 24: On May 20, 1970, Port Arthur contracted with Gulf States Utilities Company as an owner of the land in the industrial district to guarantee the continuation of the extraterritorial status of the district and its immunity from annexation by the municipality for a period not to exceed seven years. Sect. 42.044(c)(1).

FINDING OF FACT NUMBER 25: The contract between Port Arthur and Gulf States Utilities Company was renewed for successive terms of seven years and expires in 1991. (Sect. 42.044(d) in 1984.) [sic].

FINDING OF FACT NUMBER 26: At no time between [sic] April 22, 1970 (Judgment #B-77,678) to August 2, 1988 has any municipality other than the City of Port Arthur attempted to annex or exercise jurisdiction over the Gulf States Utilities Company power plant.

CONCLUSION OF LAW NUMBER 62: The final judgment in the quo waranto proceeding, Cause #B-77678 in the District Court of Jefferson County, Texas is preclusive of the issues:

(a) the corporate boundaries of the City of Port

Arthur (where relevant here) are the center line of the Neches River;

(b) the Gulf States Utilities Sabine station is within the exclusive extraterritorial jurisdiction of the City of Port Arthur; and

(c) the exclusive extraterritorial jurisdiction of the City of Port Arthur is as defined therein.

CONCLUSIONS OF LAW NUMBER 63: The City of Bridge City, while not a party to Cause #B-77678, is bound by the determinations therein made.

To hopefully simplify some of our difficulty, the appellee, City of Port Arthur, does not make any contention that the doctrine of collateral estoppel applies to this case. In appellee's, Port Arthur's, original petition and each amended petition in this case, appellee, Port Arthur plead offensively the res judicata effects of the 1970 judgment in quo warranto. The judgment was attached to and made a part of the pleadings. At trial a certified copy of the judgment was admitted into evidence and evidence was adduced from one of the attorneys of record in that case. The record reflects no challenge by appellant, then defendant, to the pleadings nor to the admission of the 1970 agreed judgment. Furthermore, the record shows no suggestion by appellant that the judgment was ambiguous. There is no question but that the 1970 agreed judgment was a judgment of great detail and that said judgment is and has been a final judgment.

(1) Bridge City contends that since the original petition in the quo warranto proceeding was filed prior to adoption of the Municipal Annexation Act, extraterritorial jurisdiction was not an issue when the judgment was entered in 1970. As previously stated, the judgment is very

detailed in its recitation of the facts, issues, conclusions, holdings and reason. In its paragraph six, the quo warranto judgment provided in 1970:

> Pursuant to the Municipal Annexation Act, Article 970(a), V.A.T.C.S., the present extraterritorial jurisdiction of the City of Port Arthur extends for a distance of three and one-half (3½) miles from the corporate limits of the City of Port Arthur as established by its Ordinance Nos. 2530, 2540 and 2738, all of which were plead by caption in Port Arthur's amended information in the nature of a quo warranto, free and clear of any municipal jurisdiction or extraterritorial claims of the City of Orange or *any other municipality of the State of Texas* . . . .

[2] Appellant claims that since the pleadings in the 1970 case were not offered in evidence, res judicata does not apply.

The Supreme Court laid out the rule of res judicata and judgment construction in *Permian Oil Co. v. Smith*, 129 Tex. 413, 107 S.W.2d 564, 567 (1937). The court held:

> A judgment of this type usually permits of no inquiry into the balance of the record from which it emanates, except in the case of certain well recognized exceptions. Where such a judgment is ambiguous, the judgment roll, and if necessary extrinsic evidence, is admissible, not to contradict the judgment, but only to aid in its construction.

That issue was before the Court in the case of *Moore v. Horn*, 359 S.W.2d 947, 950 (Tex.Civ.App.—Beaumont 1962, writ ref'd n.r.e.). There was a judgment in evidence upon which plaintiff relied on establishing record title to

land. Plaintiff offered in evidence the petition upon which the prior judgment was based. Speaking for an unanimous court, Justice Stephenson held such petition was not admissible to explain or prove the judgment "because there is nothing in the judgment revealing it to be ambiguous".

Appellant cites several cases in support of their contention against the use of the doctrine of collateral estoppel. Again, we state that the appellee, Port Arthur, has never urged collateral estoppel nor do we feel that the trial court applied said doctrine.

It is apparent to this Court that the very same ordinances, corporate boundary line, real property, extraterritorial jurisdiction and Municipal Annexation Act that were adjudicated in the 1970 judgment are in issue in this case. It is the opinion of this Court based upon previously cited authority, that for the doctrine of res judicata to apply in the case sub judice, there was no requirement that appellee introduce into evidence the pleadings upon which the 1970 judgment was made. We are of the opinion that the trial court correctly followed proper legal authority in its application of the effect of 1970 agreed judgment in the trial of the case before it.

In *Permian Oil Co. v. Smith, supra*, the Supreme Court of Texas stated:

> The principle of res adjudicata is founded in public policy and is as old as English jurisprudence. Fundamentally its purpose is to expedite justice by putting an end to litigation; and to preserve the sanctity of the judgments of the courts by making them immune from collateral attack. Once a court has exercised its functions of decision on an issue over which it has jurisdiction, and that decision becomes final, the

> parties thereto and their privies cannot escape its binding effect. Lacking this anchorage of finality a judicial system would be little more than a rule of fiat.

[3] Appellant, Bridge City, claims that because it was not a party to the 1970 proceeding, it is not bound by the judgment in that proceeding. We believe that appellant's argument must fail, not only because of the nature of quo warranto proceeding, but also because of the actions of Bridge City since the 1970 judgment.

Bridge City was formed when Port Arthur relinquished a portion of its extraterritorial jurisdiction which was awarded Port Arthur in the 1970 judgment. Bridge City explicitly ratified the boundaries of the City of Port Arthur and implicitly ratified the judgment when it was formed as a municipality by the consent of Port Arthur. Over a period of approximately 19 years since the 1970 judgment was entered, Bridge City acknowledged Port Arthur's extraterritorial jurisdiction by petitioning for relinquishment by Port Arthur on three separate occasions since the formation of Bridge City as a city.[1] The trial court found from the evidence that Port Arthur's boundaries and extraterritorial jurisdiction were adopted with the actual and legally presumed consent of "all appropriate persons". *See* TEX.LOCAL GOV'T CODE ANN. sec. 43.901 (Vernon 1988). We overrule appellant's point of error number one.

[4] Now we address only that portion of appellant's point of error number two which challenges the evidence

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[1] The three occasions were:
a) in a letter dated February 26, 1976;
b) in a letter dated April 30, 1976; and
c) in a letter dated March 23, 1979.

before the trial court as a no evidence or alternatively insufficient evidence point. Appellant contends that the trial court had no evidence or insufficient evidence to support the application of res judicata and we disagree.

When reviewing "no evidence" and "insufficient evidence" points, we follow the guidance of Justice Robert W. Calvert's law review article of of " '*No Evidence*' *and* '*Insufficient Evidence*' *Points of Error*" 38 TEXAS L.REV. 361 (1960). Justice Calvert set out the fundamental principles in determining a no evidence point and insufficient evidence point, the article states:

> 'No evidence' points must, and may only, be sustained when the record discloses one of the following situations:
>
> (a) a complete absence of evidence of a vital fact;
>
> (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact;
>
> (c) the evidence offered to prove a vital fact is no more than a mere scintilla;
>
> (d) the evidence establishes conclusively the opposite of the vital fact.
>
> 'Insufficient evidence' points may, and should, be sustained when the record discloses either of the following situations:
>
> (a) the evidence is factually insufficient to support a finding of a vital fact, or
>
> (b) the finding of a vital fact is so contrary to the great weight and preponderance of the evidence as to be clearly wrong.

We have with some detail set out the pertinent findings of fact made by the trial court regarding that court's application of the doctrine of res judicata as it applied to the 1970 judgment. In reviewing the entire record, we find that neither appellant's no evidence point nor its insufficiency of the evidence point should be sustained. Therefore, we overrule point of error number two.

It is the opinion and holding of this Court that the doctrine of res judicata through judgment in quo warranto is applicable as against appellant herein and that the 1970 agreed judgment in quo warranto operates as a bar to appellant regarding appellant's efforts to annex any properties or territories as set out, controlled and defined in said 1970 agreed judgment.

Appellant's points of error one and two are overruled.

[5] Appellant's points of error three, four and five attack the authority of the Jefferson County District Attorney as being a "proper" officer to bring this quo warranto proceeding and contends that the trial court erred and abused its discretion in finding and concluding that said District Attorney was a "proper" officer to institute this action.

We previously stated that the Attorney General for the State of Texas and the Orange County Attorney refuse and/or decline to file a quo warranto action.

Suit was filed in Orange County District Court. Appellee, City of Port Arthur, is in Jefferson County and appellant, Bridge City, is in Orange County, as is the Gulf States Utilities Power Plant. Appellant argues that the State Constitution and Statutes authorize only the Texas Attorney General and the Orange County Attorney to act

in such cases. Appellees rely upon sec. 66.002 of the Civil Practice and Remedies Code as support and authority for the action taken by Mr. Tom Maness. TEX.CIV.PRAC. & REM.CODE ANN. sec. 66-002 (Vernon 1986) reads as follows:

INITIATION OF SUIT

> (a) If grounds for the remedy exist, the attorney general or the county or district attorney of the proper county may petition the district court of the proper county or a district judge if the court is in vacation for leave to file an information in the nature of quo warranto.
>
> (b) The petition must state that the information is sought in the name of the State of Texas.
>
> (c) The attorney general or county or district attorney may file the petition on his own motion or at the request of an individual relator.
>
> (d) If there is probable ground for the proceeding, the judge shall grant leave to file the information, order the information to be filed, and order process to be issued.

Appellant contends that TEX. CONST. ANN. art. 5, sec. 21 excludes action by the Jefferson County District Attorney. Said section reading in part as follows:

> The County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys and County Attorneys shall in such counties be regulated by the Legislature. . . .

Appellant also relies upon TEX.GOV'T CODE ANN. sec. 44.223(a) and (b) (Vernon 1988) which states:

JEFFERSON COUNTY

> (a) The criminal district attorney of Jefferson County shall attend each term and session of the district courts in Jefferson County and each term and session of the inferior courts of the county, except municipal courts, held for the transaction of criminal business, and shall exclusively represent the state in all matters before those courts. He shall represent Jefferson County in any court in which the county has pending business.
>
> (b) The criminal district attorney has all the powers, duties, and privileges in Jefferson County that are conferred by law on county and district attorneys in the various counties and districts.

Appellant places strong reliance upon the case of *State ex rel. Colleyville v. City of Hurst*, 519 S.W.2d 698, 700 (Tex.Civ.App.—Fort Worth 1975, writ ref'd n.r.e.), citing the following excerpt:

> [Q]uo warranto proceedings may be instituted by the attorney general, or by a district or county attorney of proper district or county. . . . No other person may lawfully be authorized to bring such an action. . .

We note here that the *Colleyville, supra*, case did not involve a contested issue as to who is the proper person or authority to file quo warranto actions. That opinion refers in passing to the general rule regarding the attorney general, district attorney and county attorney as being the

proper "officials" to institute such proceedings, but does not expand on same. *Colleyville* does make it clear that the State is the real plaintiff and controls the litigation even though the action may be brought at the behest of and affect the rights of private parties. We do not feel that the *Colleyville* case lends strong support to appellant's position.

In 1922 the Supreme Court of Texas in the case of *Staples v. State,* 112 Tex. 61, 245 S.W. 639 (1922) rendered its opinion which we feel gives guidance and clarity to the question before us and we quote from that case with our emphasis added:

> In proceedings by quo warranto the information upon which the suit is based must be presented by a county attorney, a district attorney, or the Attorney General, though it may be based on facts related and verified by any citizen, and if, upon *his* examination and investigation thereof as a sworn officer of the sovereignty, *he thinks same sufficient and his judgment approves,* he petitions the district judge for permission to file the information upon the relation of said citizen. If the district judge thinks the information with its verification sets out sufficient cause, and his judgment is satisfied, he enters his order authorizing the suit to be filed. Thus the sovereignty safeguards the rights of parties by requiring that two of its authorized agents and officers—its Attorney General, or county attorney or district attorney, *and district judge*—approve the legality and sufficiency of the petition before the suit may be instituted.

This is exactly what occurred in the case before us.

Appellees rely on two cases which we feel adds more

clarity to the question. Those cases are: *City of Wichita Falls v. State ex rel. Vogtsberger,* 509 S.W.2d 661 (Tex.Civ.App.—Fort Worth 1974), *rev'd on other grounds,* 533 S.W.2d 927 (Tex.), *cert. denied,* 429 U.S. 908, 97 S.Ct. 298, 50 L.Ed.2d 276 (1976) and *City of Grand Prairie v. State ex rel. Crouch,* 266 S.W.2d 184 (Tex.Civ.App.—Fort Worth 1954 no writ). These cases are more in point despite opinion to the contrary expressed in appellant's brief. In both *Vogtsberger* and *Crouch,* the property in dispute was located partially in two different counties. The respective county attorneys filed quo warranto actions in district court within their respective counties. In each case, the Court of Appeal held that the suits be transferred to district courts in the respective defendants' county. In each case, neither court of appeal made mention of any problem with allowing the county attorney who originally filed the suit to remain as the State's representative. Appellant contends that both *Vogtsberger* and *Crouch* are distinguished by the Texas Supreme Court case of *State ex rel. Bennett v. Clarendon Independent School District,* 156 Tex. 542, 298 S.W.2d 111 (1957). Appellant claims that *Bennett* stands for the principle that when venue of the quo warranto action was changed from Armstrong County to Donley County, the Armstrong County Attorney was required to be replaced by the Donley County Attorney as the State's representative. This was not at issue as the Donley County Attorney exercised his prerogative and filed an amended information entering the suit as the State's representative after the case was transfered to Donley County. The transfer was not contested by any of the parties involved. These proceedings were provided in the opinion of the Supreme Court as merely facts of the case, and did not express any approval or disapproval as to the change of district courts or county attorneys. It is the opinion of this Court that the *Bennett* case gives no support to the question of the propriety of a district attorney from one county instituting a quo warranto suit in another

county.

The city council of appellee, City of Port Arthur, passed a resolution requesting the Criminal District Attorney of Jefferson County to bring this quo warranto proceeding. The corporate boundaries and municipal jurisdiction of a city in Jefferson County were challenged. The Criminal District Attorney of Jefferson County was the State's representative when these very boundaries were adjudicated in 1970. Clearly that office has same standing or interest in 1988 that it had in 1970. Orange County is no more than a place of proper venue of this action since the area in dispute and appellant, Bridge City, are located in Orange County. However, permissive venue does not establish standing or justiciable interest of a state official. The real party in interest is the City of Port Arthur, since appellant's annexation ordinances IX-42 and IX-43 affect the City of Port Arthur's extraterritorial jurisdiction and the revenues of the City of Port Arthur, under the Industrial District Agreement with Gulf States Utilities. Port Arthur is domiciled in Jefferson County. We are of the opinion that when the Attorney General and the Orange County Attorney declined to proceed with the quo warranto action, the District Attorney in and for Jefferson County was and is the "proper party" to bring such quo warranto proceeding.

We are of the further opinion that appellant's restrictive use of TEX.GOV'T CODE ANN. sec. 44.223 (Vernon 1988) and TEX. CONST. art. 5, sec. 21 is improper. The statute does not restrict the district attorney and in fact states that: "He shall represent Jefferson County in any court in which the county has pending business." Unless we interpret this statute broadly, there is clearly no directive language in the statute allowing it to be interpreted one way or the other. Therefore, appellant's position regarding this statute must also fail. Based on the foregoing, we overrule plaintiff's points of error three, four and five.

Appellant's points of error six, seven and eight deal with the trial court's awarding of $86,089.25 dollars attorney's fees in favor of appellee, Port Arthur and against appellant, Bridge City, contending that there exist no statutory or contractual basis for attorney's fees and no evidence or alternatively insufficient evidence to support the granting of same. Appellant further urges error in the trial court's awarding of such fees stating that such fees were not properly segregated thus, supported by no evidence or alternatively insufficient evidence. Further that the trial court abused its discretion as a matter of law and unconditionally awarding attorney's fees on appeal.

[6] Appellant takes the position that attorney's fees are not recoverable in a quo warranto action and cites to this Court TEX.CIV.PRAC. & REM.CODE ANN. sec. 66.003 (Vernon 1986) which authorizes a successful quo warranto litigant to recover "cost of prosecution". In further support of this position, appellant refers us to *First City Bank-Farmers Branch, Tex. v. Guex,* 677 S.W.2d 25, 30 (Tex.1984):

> [A]n award of attorney's fees may not be supplied by implication but must be provided for by the express terms of the statute in question.

It is obvious that the legislature did not expressly provide for a recovery of attorney's fees in a quo warranto action and case law supports the proposition that cost does not ordinarily include attorney's fees unless the statute expressly so provides. *Johnson v. Universal Life & Accident Ins. Co.,* 127 Tex. 435, 94 S.W.2d 1145, 1146 (1936). *Buck v. Johnson,* 495 S.W.2d 291, 297 (Tex.Civ.App.—Waco 1973, writ ref'd n.r.e.); *Arnold v. Crockett Independent School District,* 389 S.W.2d 608, 610 (Tex. Civ.App.—Tyler 1965) *modified* 404 S.W.2d 27 (Tex.1966).

Appellant agrees that attorney's fees may be recovered in declaratory judgment actions, however appellant contends that the actions taken by the City of Port Arthur was exclusively in quo warranto as opposed to action for declaratory relief. It is clear to us from the record that the action originally brought by Port Arthur was pursuant to sections 37.001-37.011 Civil Practice & Remedies Code. The relief sought by Port Arthur was for declaratory judgment. The trial court found as a matter of law that Port Arthur was entitled to the relief it sought and granted the declaratory judgment. We know of nothing that would prevent appellee, City of Port Arthur, from proceeding in a dual capacity as relator in quo warrranto and plaintiff in declaratory judgment. *Patton v. Nicholas,* 269 S.W.2d 482, 484 (Tex.Civ.App.—El Paso 1954), *rev'd in part on the grounds,* 279 S.W.2d 848 (Tex.1955); *James v. Perry,* 208 S.W.2d 145, 146 (Tex.Civ.App.—Austin 1948 writ ref'd n.r.e.).

[7] Appellant seems to argue alternatively that this case involves both declaratory judgment for which attorney's fees are recoverable, and quo warranto for which attorney's fees are not recoverable and since Port Arthur did not segregate the proof of charges attributable to each action, the award is flawed, citing *Kosberg v. Brown,* 601 S.W.2d 414, 418 (Tex.Civ. App.—Houston [14th Dist.] 1980, n.w.h.). In this regard appellee, City of Port Arthur, calls our attention to the case of *Flint & Assoc. v. Intercon Pipe & Steel,* 739 S.W.2d 622, 624-25 (Tex.App.—Dallas 1987, writ denied):

> A corollary to the rule is that the services for which reasonable fees may be awarded include those rendered in connection with all claims, even if recovery of attorney's fees is not authorized for such claims, if they arise out of the same transaction and are so interrelated that their prosecution

or defense entails proof or denial of essentially the same facts.

Wilkins v. Bain, 615 S.W.2d 314, 316 (Tex.Civ.App.—Dallas 1981, no writ); *Williamson v. Tucker,* 615 S.W.2d 881 (Tex. Civ.App.—Dallas 1981, writ ref'd n.r.e.); *Triland Inv. Group v. Warren* 742 S.W.2d 18 (Tex.App.—Dallas 1987) *rev'd on other grounds,* 779 S.W.2d 808 (1989).

It is apparent to this Court that appellee Port Arthur's action in quo warranto and for declaratory judgment were so intertwined and interrelated as to defy segregation, and that the trial court did not err in its award of attorney's fees in the sum of $56,089.95 through the entry of judgment in this case.

[8,9] In point of error number eight, appellant contends that the trial court erred and abused its discretion as a matter of law in unconditionally awarding attorney's fees on appeal. The trial court in its findings of fact, found the sum of $56,089.95 to be reasonable and necessary attorney's fees through the entry of judgment in this cause. The court further found that an additional $15,000.00 in the event the cause is appealed to the Court of Appeals; and an additional $10,000.00 in the event that writ of error is sought to the Supreme Court of Texas; and an additional $5,000.00 in the event writ of error is granted by the Supreme Court of Texas. In the trial court's judgment however, the court entered judgment in favor of the City of Port Arthur in the sum of $86,089.95 as attorney's fees with remittitur as follows:

(a) $30,000.00 if no appeal is prosecuted in the Court of Appeals;

(b) $15,000.00 if no application for writ of error is prosecuted; and

(c) $5,000.00 if writ of error is not granted by the Texas Supreme Court.

Appellant complained that the trial court unconditionally awarded $30,000.00 in appellate attorney's fees stating that this penalizes a party for taking a successful appeal. The manner in which the trial court in our case set out the attorney's fees award in its judgment, is virtually identical to the case of *Reynolds v. McCullough*, 739 S.W.2d 424 (Tex.App.—San Antonio 1987), writ denied. In *Reynolds* the court stated:

> This form of judgment has been approved in several cases before the courts of civil appeals. One of our courts has said: 'If the remittitur casts doubts on the finality of the judgment there is no reason why it may not be disregarded for appeal purposes as in *Cooksey*.' Citing *International Security Life Insurance Co. v. Spray*, 468 S.W.2d 347, 349 (Tex. 1971) (citing *Security Life Insurance Co. v. Executive Car Leasing Co.*, 433 S.W.2d 915, 919 (Tex.Civ.App.—Texarkana 1968, writ ref'd n.r.e.)) and analyzing *Cooksey v. Jordan*, 104 Tex. 618, 143 S.W. 141, (1912).

The *Reynolds* case further states that "[T]he judgment before us fixes a total award first and then adds a proviso which reduces the award by remittitur in the absence of appellate steps."

We feel that the manner in which the trial court awarded attorney's fees both up to the entry of judgment and on appeal was proper. Further, the appellant argues that the trial court abused its discretion in awarding attorney's fees due a contract between intervenors Gulf States Utilities Co. and appellees and that a recovery by appellees from appellant herein, would constitute some double recovery. Appellant does not, however, inform us as

to how or why appellant is or should be the third party beneficiary of such agreement. It was appellant's acts in adopting Ordinances IX-42 and IX-43 which necessitated appellees' quo warranto action seeking declaratory relief.

[10] With regard to appellant's contention of no evidence or alternatively, insufficient evidence to support the awarding of attorney's fees, we look to the record. In this case the fees were based on unchallenged testimony of an attorney of 51 years at the Bar of Texas. He spoke of his vast experience in matters of this kind and that co-counsel, of the monetary significance of this litigation to the clients in multiple millions of dollars and of the difficulty and novelty of the matter. At one point in Mr. Earl Black's testimony, he stated: "It's very complicated, it's time-consuming . . . It's just a time-consuming thing. It is a complicated case."

He testified to hourly rates of $125.00 and $100.00 and more than 250 hours expended. His testimony of reasonable and necessary fees through trial was $56,089.95. He also expressed an informed opinion of appellate fees of $15,000.00 in the Court of Appeal, $10,000.00 if there was an application for writ of error, and $5,000.00 if a writ of error was granted by the Supreme Court. The trial court findings of fact are based on Mr. Black's testimony. No evidence was offered in opposition.

Based on the foregoing reasons, appellant's points of error six, seven and eight are overruled.

In discussing and making our ruling on appellant's points of error nine, ten and eleven, it is necessary that we address each specific point of error individually even though all three points of error allege trial court error in its findings and judgment relating to appellee's Ordinances IX-42 and IX-43.

Point of error number nine states that the trial court erred and abused its discretion in entering findings 38-42 and conclusions 62-3 and in entering judgment holding Bridge City's Ordinance IX-42 wholly void, even though only part of the tract was within Port Arthur's claimed extraterritorial jurisdiction, there being no evidence or alternatively insufficient evidence to support same.

We have previously set out the guidelines on the "no evidence" and "insufficient evidence" points and apply those same principles here.

Appellees make no procedural attack upon appellant bringing these points of error, therefore, we assume that all procedural prerequisites have been met.

In 1963, the Municipal Annexation Act, art. 970a (now sections 42.001 and 43.001, et seq., Local Government Code), created what has come to be known as the concept of extraterritorial jurisdiction and prohibits annexation by one city of land already in the extraterritorial jurisdiction of another. *City of W. Orange v. State ex. rel. City of Orange*, 598 S.W.2d 387, 390 (Tex.Civ.App.—Beaumont 1980), *rev'd on other grounds*, 613 S.W.2d 236 (Tex.1981); *see also, Friendship Village v. State*, 738 S.W.2d 12, 14 (Tex.App.—Texarkana 1987, writ ref'd n.r.e.). TEX.LOCAL GOV'T CODE ANN. sec. 42.023 (Vernon 1988) (formerly Section 3C of the Municipal Annexation Act) states:

> The extraterritorial jurisdiction of a municipality may not be reduced unless the governing body of the municipality gives its written consent by ordinance or resolution, except in cases of judicial apportionment of over-lapping extraterritorial jurisdiction under section 42.901.

[11] The City of Bridge City, appellant herein, was created only after Port Arthur's consent and partial relinquishment of a portion of Port Arthur's extraterritorial jurisdiction. Port Arthur relinquished only that territory requested by Bridge City and later when Bridge City requested relinquishment of other portions of Port Arthur's extraterritorial jurisdiction, Port Arthur denied two such requests and relinquished territory requested in a third request. The evidence before the trial court seems clear that Port Arthur never consented to the relinnuishment of any of its extraterritorial jurisdiction to Bridge City in order for Bridge City to form its extraterritorial jurisdiction. Furthermore, it is clear that Bridge City has no extraterritorial jurisdiction where its corporate boundaries adjoin Port Arthur's extraterritorial jurisdiction. Therefore the question is, "How can Bridge City annex territory within Port Arthur's extraterritorial jurisdiction?" In *City of Houston v. Savely*, 708 S.W.2d 879, 886 (Tex.App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.), *cert. denied*, 482 U.S. 928, 107 S.Ct. 3212, 96 L.Ed.2d 698 (1987) the court held where the City of Nassau Bay was created out of the relinquishment of another city's extraterritorial jurisdiction, Nassau Bay had no extraterritorial jurisdiction along that boundary.

[12] Appellant Bridge City argues that because Ordinance IX-42 annexes land that is partially outside the extraterritorial jurisdiction of Port Arthur and contains a "savings clause", the annexation of that area outside Port Arthur's extraterritorial jurisdiction should not be declared void. Bridge City, in its "savings clause" of Ordinance IX-42 states:

> [I]f the taking of any territory annexed by this Ordinance is declared by a Court of competent jurisdiction to be invalid and/or illegal, it shall not affect the balance of the property annexed and,

attempted to be annexed and that property shall remain as part of the City of Bridge City, Texas.

In support of appellant's contention that its "savings clause" retains any remaining property or land which was not a part of Port Arthur's extraterritorial jurisdiction, cites as its support the following three cases: *City of Houston v. Savely, supra,; City of Houston v. Harris Co. Eastex Oaks W. and S. Dist.*, 438 S.W.2d 941, 949 (Tex.Civ.App.—Houston [1st dist.] 1969, writ ref'd n.r.e.) and *State v. City of San Antonio*, 259 S.W.2d 248, 251 (Tex.Civ.App.—San Antonio 1953, writ ref'd n.r.e.).

In the three cases cited by appellant, the ordinances specifically expressed the intent not to incorporate territory the city was not lawfully to do.

Bridge City's "saving clause" expresses no intent to exclude from annexation territory over which it does not have jurisdiction. In effect, Bridge City's argument has the effect of saying that if plaintiff prevails against Bridge City in declaring the ordinance void, then that part which is not void is saved. Bridge City would have the court construe the "savings clause" to require the court to redraft the ordinance to define what territory was intended to be annexed. Such usurpation of the legislative function by the judiciary is specifically prohibited. *City of West Lake Hills v. State ex rel. City of Austin*, 466 S.W.2d 722, 728 (Tex.1971); *City of Irving v. Dallas County Flood Control Dist.*, 383 S.W.2d 571 (Tex.1964). It appears to us that appellant would have had the trial court reframe Ordinance IX-42 rather than declaring it void. This approach was rejected in *City of Willow Park v. Bryant*, 763 S.W.2d 506, 511 (Tex.App.—Fort Worth 1988, no writ) wherein the court held:

This is where the trial court erred . . . . But

> the response of the trial court was to effectively redraft Ordinance 107 to also disannex the islands. Neither the trial court nor this court has the power to redraft the ordinance.

Altering the boundaries of a municipality is a legislative function, not a judicial function. While courts may, at times, sever invalid portions of ordinances and leave enforced the valid portions, they may not add to or redraft the ordinance, since that usurps the legislative function.

If appellant's Ordinances IX-42 and IX-43 be saved, it must be done by other evidence and not by its intended "saving clauses".

[13] Appellant further contends that there can be no extraterritorial jurisdiction within a navigation district's boundaries, since they were specifically exempted from the operation of extraterritorial jurisdiction under Article 970a. The evidence shows that the city limits of Port Arthur extend to mid-stream of the Neches River. Appellant points out that from the centerline of the Neches River eastward for a distance of 2,500 feet from mid-stream of said Neches River, constitutes the navigation territory's eastern one-half and thus a gap exists between Port Arthur city limits and the territory in nuestion. Appellant also points out that this "gap" means that Port Arthur's claimed extraterritorial jurisdiction is not contiguous or adjacent to Port Arthur and that the tracts annexed by Bridge City are not contiguous or adjacent to Port Arthur.

The evidence before the trial court showed that in 1913, the City of Port Arthur annexed areas on the east side of the Neches River for the limited purpose of establishing a navigation territory pursuant to TEX.REV.CIV.STAT.ANN. art. 1183, (Vernon 1963).

Evidence further showed that from 1950 through 1961 Port Arthur adopted a series of nine annexation ordinances which established its relevant corporate boundaries as the centerline of the Neches River. Evidence also showed that such annexations included portions of the limited navigation territory and since 1961 the corporate boundaries of Port Arthur has been the centerline of the Neches River. The limited navigation territory extended along and 2,500 feet east of the centerline of the Neches River in Orange County.

It is clear to us that since 1963, the area along and 2,500 feet east of the centerline of the Neches River has been within Port Arthur's limited navigation territory and its extraterritorial jurisdiction. Appellant argues that such cannot coexist and that there is some type of a "gap" of 2,500 feet which prevents the extraterritorial jurisdiction from being contiguous to Port Arthur's corporate boundary. We disagree with appellant's contention in this regard.

This Court held that a city's navigation territory may overlap with the city's extraterritorial jurisdiction. *City of Port Arthur v. Jefferson County, etc.*, 596 S.W.2d 553 (Tex.Civ.App.—Beaumont 1980, writ ref'd n.r.e.); *City of Houston v. Houston Endowment, Inc.*, 428 S.W.2d 706 (Tex.Civ.App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.). Appellant makes strong contention that the concept of extraterritorial jurisdiction is a creature of statute, with which we agree, first appearing in TEX.REV.CIV. STAT.ANN. art. 970a (Vernon 1963). Appellant further tells us that the legislature expressly declared that art. 970a did not repeal or effect in any way TEX.REV.CIV.STAT.ANN. arts. 1183-1187 (Vernon 1963), with which we agree, and was inapplicable to any territory held under those statutes dealing with the limited annexation of navigation territory. Appellant further says

that art. 970a (creating extraterritorial jurisdiction) was legislatively declared inapplicable to such navigation district and further that there can be no extraterritorial jurisdiction within a navigation district's boundaries, since they were specifically exempted from the operation of the extraterritorial jurisdiction under art. 970a. With this, we disagree.

Since the legislature re-enacted the Municipal Annexation Act, without material change, after the decision of the *Houston Endowment, supra,* and *Jefferson County Fresh Water District, supra,* cases, we must presume that the legislature knew and adopted the interpretation placed by the new act should receive the same construction as the original act. *Coastal Industrial etc. v. Trinity Portland,* 563 S.W.2d 916 (Tex.1978). *In re Estate of Carrigan,* 517 S.W.2d 817 (Tex.Civ.App.—Tyler 1974, no writ).

[14] The trial court found that Bridge City's Annexation Ordinances IX-42 and IX-43 encompassed territory in Port Arthur's extraterritorial jurisdiction and declared both ordinances void. We are satisfied that there was sufficient evidence to make such finding. The court further found from the evidence that the territory described in Bridge City's Annexation Ordinance IX-43 lies wholly within the extraterritorial jurisdiction of Port Arthur which includes the Gulf States Utilities Power Plant. The trial court further found from the evidence that the territory described in Bridge City's Annexation Ordinances IX-42 includes territory lying partially within the extraterritorial jurisdiction of Port Arthur. The court also found from the evidence that the territory described in Bridge City's Annexation Ordinance IX-43 is neither contiguous or adjacent to the City of Bridge City, except as contiguous to territory included in IX-42.

From an evidentiary standpoint, we note that

appellant pleads no facts, nor produces any evidence that appellees' extraterritorial jurisdiction did not extend for three and one-half (3½) miles from its corporate boundaries while the evidence from appellee, City of Port Arthur, preponderated that it did. No doubt the trial court also considered Bridge City's previous request for relinquishment by Port Arthur of certain territory within its extraterritorial jurisdiction as appellant's awareness of its location.

[15] There is an additional reason to support the trial court's findings of fact and conclusions of law relating to Ordinance IX-43 which land encompasses the Gulf States Utilities' Power Plant. Evidence before the trial court showed that Ordinance IX-43 is less that 1,000 feet in width at its narrowest point and the evidence clearly shows that the property annexed or attempted to be annexed by Ordinance IX-43, was not contiguous to Bridge City on two sides. The trial court found such as relevant facts and declared this infirmity as a basis for invalidating the ordinance. Appellant has not assailed this question on appeal, therefore, it exists as an independent ground for affirming the trial court's judgment that Ordinance IX-43 is void. *Tilotta v. Goodall*, 752 S.W.2d 160, 161 (Tex.App.—Houston [1st Dist.] 1988, writ denied).

The 70th Legislature specifically prohibited this strip annexation. Municipalities—Annexation, ch. 1077, sec. 1, subsection B-1(a), 1987 *Tex.Gen.Law 3674* 15 amended the Municipal Annexation Act by providing:

> No . . . city may annex any area . . . unless the width of such area at its narrowest point is at least 1,000 feet. . . .

TEX.LOCAL GOV'T CODE ANN. sec. 43.054 (Vernon 1988) and amendments.

For the foregoing stated reasons, we hold that the trial court did not err in declaring Ordinances IX-42 and IX-43 void.

[16] Appellant's point of error number eleven contends that the trial court erred and abused its discretion in entering findings of fact and conclusions of law and in entering judgment that IX-43 was not adjacent to Bridge City becuase IX-42 (the connecting link between Bridge City and IX-43) was void as within Port Arthur's claimed extraterritorial jurisdiction and was not adjacent to Bridge City. There being no evidence or alternatively, insufficient evidence to support same.

In support of its position, appellant places heavy emphasis on the fact that the land, which was the subject of the two Ordinances enacted by Bridge City, is more in the vicinity of Bridge City than it is to Port Arthur. In this regard, they state how Port Arthur is separated from these two tracts by the Neches River and that the property attempted to be annexed was wholly within Orange County of which Bridge City is a domiciliary. Appellant further proffered to the trial court and to this Court that Port Arthur is also separated from the questioned tracts by telephone exchange system, gas companies, electrical power systems, cable television systems, water drainage systems, political systems, school districts, administrative districts and tax appraisal districts. Appellant's bottom line appears to be that the tracts of land attempted to be annexed are more closely related to appellant than to appellee, City of Port Arthur. There was no doubt adequate and sufficient evidence to support those contentions, however, we cannot overlook the evidence which lead the trial court to its conclusion that the attempted annexations by Ordinances IX-42 and IX-43 affected property clearly within Port Arthur's extraterritorial jurisdiction.

[17-21] Appellant alleges that appellee had the burden to establish, inter alia, Port Arthur's precise boundary, the extent of its extraterritorial jurisdiction and exactly where Port Arthur's extraterritorial jurisdiction lay. Without establishing precisely where Port Arthur's extraterritorial jurisdiction lay. Without establishing precisely where Port Arthur's extraterritorial jurisdiction started and stopped, it would be impossible to determine with exactitude whether Bridge City's Ordinances IX-42 and IX-43 encroached on Port Arthur's claimed extraterritorial jurisdiction. We agree with appellant that it was appellee Port Arthur's burden to show by competent evidence what was covered under their extraterritorial jurisdiction. Appellant cites for us the case of *Oake v. Collin County*, 692 S.W.2d 454 (Tex.1985). In that case, Oake's land lay across two counties. By agreement between the tax assessor of the two counties, Oake paid taxes to Dallas County. In 1981, the agreeement apparently ended. Thereafter, Collins County's tax assessor sent Oake a tax bill on that portion of the property they determined to be in Collins County. The boundary line between Dallas County and Collins County on Oake's tract, however, has *never* been surveyed and hence was indefinite and could not be precisely ascertained without an extensive survey. The public body had made no survey at all. Oake sued for a declaratory judgment of the boundary line and for temporary injunction against the taxing entities from assessing or collecting of taxes until the location of the boundary line was determined. The trial court granted Oake a summary judgment, which the Court of Appeals reversed. The Supreme Court, reversing the Court of Appeals' judgment, affirmed the trial court's summary judgment for Oake. The basis of the trial court's summary judgment decision was that the county bears the burden of identifying the location of its own boundaries. The dispositive fact in *Oake* was that Collin's County had never surveyed the tract in question or its boundary and thus, could not establish its boundary or

authority with certainty. In our case to some extent, the plaintiffs admit the same failure in being unable to produce a metes and bounds description. Port Arthur's extraterritorial jurisdiction had never been identified or described by ordinance or resolution. Actual field work had never been done to measure with exactness Port Arthur's claimed extraterritorial jurisdiction. The marsh had never been walked to determine exactly Port Arthur's claimed extraterritorial jurisdiction.

Perhaps the most descriptive claim by Port Arthur of its extraterritorial jurisdiction is that contained in the agreed judgment of 1970.

Somehow the appellant has apparently overlooked the admission of Plaintiff's Exhibits 1, 1a and 1b accompanied by the testimony relating to same. It is clear that the Plaintiff's exhibits consisted of maps setting out in more than adequate detail evidence that both Ordinances IX-42 and IX-43 were within the three and one-half mile extraterritorial jurisdiction of the City of Port Arthur. The trial court not only had these exhibits along with the testimony relating to same, but also had before it the 1970 agreed judgment which was to some extent definitive of Port Arthur's extraterritorial jurisdiction.

The obvious objection to the exhibits referred to would have been that they were inadmissible and that they were clearly hearsay, however, Plaintiff's Exhibits 1, 1a and 1b were admitted into evidence without objection and therefore should not be denied probative value merely because they were hearsay. *See,* TEX.R.CIV.EVID. 802.

Appellant appears to demand some degree of exactness in defining the exact location of the further most eastern boundary of Port Arthur's extraterritorial jurisdiction. We presume that appellant would require appellee,

City of Port Arthur, to locate its boundaries the same as if found in a conveyance by deed. We do not believe this to be the law in the circumstances before us.

In construction of the subject matter of an ordinance, courts should treat as certain that which may be made certain, exactly as would be the requirement of the construction of a statute. In statutory construction, it is the duty of a court, where it is possible, to ascertain the intent of the legislative body which has acted and, when so ascertained, to give effect to that intent. There is not the requirement for specificity which is required of a deed. Description of land contained in annexation ordinance could be made, by construction, to be certain and was thus sufficient. *City of Wichita Falls v. Vogtsberger,* 526 S.W.2d 618 (Tex.Civ.App.—Fort Worth 1975) *rev'd, 533 S.W.2d 927 (Tex.) cert. denied.* 429 U.S. 908, 97 S.Ct. 298, 50 L.Ed.2d 276 (1976). We adhere to that holding and apply it to the case before us. There should be no question but that an exact boundary line could be made using the center of the Neches River as a point of beginning and extending eastward for a distance of 3.5 miles to make certain that which could be made certain.

We are of the opinion that the trial court had more than sufficient evidence to find and conclude that Ordinance IX-43 was not adjacent to Bridge City because Ordinance IX-42 (the connecting link) was void as a result of being within Port Arthur's extraterritorial jurisdiction.

We overrule appellant's points of error nine, ten and eleven. The trial court's judgment is hereby affirmed in all regards.

AFFIRMED.

BROOKSHIRE, J., concurs.

BURGESS, J., dissents.

BROOKSHIRE, Justice, concurring.

This writing is a full and cordial concurrence with the opinion of Chief Justice Walker.

Significant and important is Chapter 676, Tex.S.B. 785, 70th Leg. (1987). The said Chapter 676 is found at page 2527. This legislative enactment, and especially Section 2 thereof, entitled "VALIDATION", effects, in my view, a complete ratification, adoption and approval of the annexations taken by the City of Port Arthur.

In my view, the learned and respected trial judge's judgment should be affirmed, inter alia, because of the paramountcy of the enactments of the Legislature of the State of Texas coupled with Port Arthur's annexations.

The Appellee's annexations (validated most broadly by the Legislature) and the recored demonstrate very strong evidence of high probative value. This evidence amply supports the trial bench's findings of fact and conclusions of law. The record clearly reflects that the City of Port Arthur made numerous attempts to entreat the Appellant, the City of Bridge City, to rectify and correct the contested ordinances. Appellant significantly declined to do so. Hence, the resulting attorneys' fees became and were necessary; Port Arthur was left with no realistic choice but to proceed to litigation.

Strictly as a matter for a future time and another future legislative session, it is not imprudent or impudent to observe that, from a philosophical—searching for the truth—position; the Legislature (enlightened by

appropriate committee hearings) could empower the protagonist cities herein to share in the tax revenues. This must await a future date. As a purely hypothetical consideration, let us supposes that about 50% of the employees, working at the power station, live in and use the municipal services of Bridge City and about 50% of the employees, working at the same power station, live in and use the municipal services of Port Arthur. Why, then, would it not be fair, reasonable and equitable for the contesting municipalities to share in the tax monies?

But there has to be certainty and predictability in taxation matters of this type and we must adhere to the law presently in effect; the Court's opinion is correct and has the quality of rightness.

Port Arthur, being the Plaintiff, filed its original petition on September 23, 1988. The trial commenced on January 17, 1989, and the final judgment was signed and entered on January 27, 1989, by a very experienced and hightly respected jurist. The said Chapter 676 was fully effective on August 31, 1987. Hence, that chapter governed the proceedings and made inviolate Appellee's annexations and their sequelae. I sanguinely and sagaciously concur.

BURGESS, Justice, dissenting.

I respectfully dissent. I would reverse and enter a take nothing judgment. I analyze the case in the following manner.

THE BURDEN OF PERSUASION

Port Arthur originally filed the action for declaratory judgment seeking to declare the Bridge City annexation ordinances void. Port Arthur later filed an "Amended First Supplemental Petition" and the Quo Warranto and first

amended petition. Port Arthur sought the relief thus assuming the burden of persuasion that the annexations were void. They began their attack based upon the prior judgment. If they proved it was res judicata or that it collaterally estopped Bridge City, then no further proof was required. However, if they proved neither, then they were required to prove that the annexations were within their extraterritorial jurisdiction ("ETJ"). To do this, they had to establish their ETJ as being contiguous and within 3½ miles of their corporate boundaries. TEX.LOC.GOV'T CODE ANN. sec. 42.021(4) (Vernon 1988). Clearly, Bridge City assumed no burden of persuasion since Port Arthur did not attack the ordinances on any procedural defects.

RES JUDICATA & COLLATERAL ESTOPPEL

Our Supreme Court in *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816 (Tex. 1984) said at 818:

> Res judicata is frequently characterized as claim preclusion because it bars litigation of all issues connected with a cause of action or defense which, with the use of diligence, might have been tried in the prior suit. (citation omitted) When a prior judgment is offered in a subsequent suit in which there is identity of parties, issues and subject matter, such judgment is treated as an absolute bar to retrial of claims pertaining to the same cause of action on the theory that they have merged into the judgment. (citations omitted)
>
> . . . Collateral estoppel is narrower than res judicata. It is frequently characterized as issue preclusion because it bars relitigation of any ultimate issue of fact actually litigated and essential to the judgment in a prior suit, regardless of whether the second suit is based upon the same

cause of action. (citations omitted). . . .

. . . .

> A party seeking to invoke the doctrine of collateral estoppel must establish (1) the facts sought to be litigated in the second trial were fully and fairly litigated in the prior action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action. (citations omitted).

The majority states "it is clear that the trial court did not differentiate between the doctrines of collateral estoppel or res judicata" then adopts appellees' contentions that the trial judge based his judgment under res judicata rather than collateral estoppel. Conclusion of law number 62 says the prior judgment is "preclusive of the issues." Conclusion of law number 63 acknowledges the City of Bridge City was not a party to the prior proceeding, but "is bound by the determinations therein made." These indicate to me that the trial judge applied the principles of collateral estoppel rather than res judicata.

The distinction made between claim preclusion and issue preclusion is not simply a technical one. In the instant suit, the claim made by Port Arthur is that Bridge City's annexation was void. An issue within that claim was generally whether the annexation included property located within Port Arthur's ETJ and specifically whether the Gulf States' plant was included within Port Arthur's ETJ and Bridge City's annexation. Under a collateral estoppel analysis, the uncontroverted evidence is that the prior judgment was an agreed judgment and there was *never* and contested adversarial trial, thus the issues in the second trial were not fully and fairly litigated in the prior suit.

Under either analysis, there was not an identity of parties or their privies. In *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361 (Tex.1971), Justice Steakley, at 363 stated:

> . . .It has been emphasized that privity is not established by the mere fact that persons may happen to be interested in the same question or in proving the same state of facts. (citations omitted) Also, that privity connotes those who are in law so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right. (citations omitted). . . .
>
> . . .Due process requires that the rule of collateral estoppel operate only against persons who have had their day in court either as a party to the prior suit or as a privy, and, where not so, that, at the least, the presently asserted interest was actually and adequately represented in the prior trial.

No one argues that Bridge City was not a party to the prior suit. Therefore, the majority has to be implying that Bridge City s a privy or successor in interest to the City of Orange. There is nothing in the record to support such an implication and certainly the trial judge made no such finding or conclusion.

Even if the majority has correctly characterized the holding as res judicata, a judgment in one suit will not operate as res judicata to a subsequent suit where, in the interval, facts have changed or new facts have occurred. *Marino v. State Farm Fire & Cas. Ins. Co.*, 787 S.W.2d 948 (Tex. 1990). The City of Bridge City did not exist at the time of the prior judgment. This alone is a new or changed fact.

ESTABLISHMENT OF THE EXTRATERRITORIAL JURISDICTION

The majority agrees "with appellant that it was appellee Port Arthur's burden to show by competent evidence what was covered under their extraterritorial jurisdiction." The majority further acknowledges that Port Arthur failed in being able to produce a metes and bounds description of their claimed ETJ, the claimed ETJ had never been identified or described by ordinance or resolution, no actual field work had been done to measure with exactness the claimed ETJ and the ground (marsh) had never been walked to determine exactly the claimed ETJ. It is true that the description of land in annexation ordinances is not required to meet the specificity required in a deed. *See City of Wichita Falls v. Vogtsberger,* 526 S.W.2d 618 (Tex. Civ.-App.—Fort Worth 1975), *rev'd on other grounds,* 533 S.W.2d 927 (Tex.), *cert. denied* 429 U.S. 908, 50 L.Ed.2d 276, 97 S.Ct. 298 (1976); *State v. City of Fort Worth,* 339 S.W.2d 707 (Tex.Civ.App.—Fort Worth 1960, writ ref'd n.r.e.); and *City of West Orange v. State ex rel. City of Orange,* 598 S.W.2d 387 (Tex.Civ.App.—Beaumont 1980) *rev'd on other grounds,* 613 S.W.2d 236 (Tex.1981) In each of these cases, however, there was *some* description in the annexation ordinance. In this case, there was only an arc on a map supposedly depicting the outward boundary of Port Arthur's ETJ. While TEX.R.CIV.EVID. 802 states inadmissible hearsay evidence admitted without objection should not be denied probative value just because it is hearsay, it does not dictate that such evidence does indeed have probative value. *Waldrop v. Manning,* 507 S.W.2d 626 (Tex.Civ.App.—Texarkana 1973, writ ref'd n.r.e.) held that when maps are merely opinions and conclusions of their respective draftsmen, they have no probative force if they contain no factual information tying them to a survey. The depictions of the ETJ on the maps are not tied to any

survey and are inconsistent among themselves as to the location of the claimed ETJ.

The majority mentions *Oake v. Collin County*, 692 S.W.2d 454 (Tex.1985) and briefly discusses the facts and holding. I believe the case is quite persuasive and controlling. While *Oake* involves the issue of taxation and who should bear the burden of proof that a particular county boundary exists and this case does not, there is a larger principle. That principle is that a governmental subdivision bears the burden of identifying its own boundary line. Through the extraterritorial jurisdiction scheme, the legislature has allowed municipalities to exercise certain controls over property. The public, both individuals and bodies politic, are entitled to know if a particular piece of property is claimed to be within a certain ETJ. If there becomes a dispute, as in *Oake* and here, then the governmental subdivision attempting to exercise jurisdiction, control or any type of dominion over the property should have the burden of identifying the boundary line.

PROPER QUO WARRANTO OFFICER

The question in the context before this court has never been written upon. I agree with the majority in concluding that *State ex rel. Colleyville v. City of Hurst*, 519 S.W.2d 698 (Tex.Civ.App.—Fort Worth 1975, writ ref'd n.r.e.), is not particularly controlling in that it only restated, at 700, the general rule:

> [A] quo warranto proceeding may be instituted by the attorney general, or by a district or county attorney of the proper district or county. . . . No other person may lawfully be authorized to bring such an action.

Likewise, none of the other cases cited by the majority

speak to this particular issue; when an objection is lodged to the district or county attorney of the non-venue county bringing the Quo Warranto. The current statute. TEX.CIV.PRAC. & REM.CODE ANN. sec. 66.002 (Vernon 1986), states it in a slightly different way:

> [T]he attorney general or the county or district attorney of the proper county may petition the district court of the proper county . . . for leave to file an information in the nature of quo warranto.

Therefore, to determine which district or county attorney may petition for leave to file, the proper county must be determined. Both quo warranto proceedings, *Woodson Independent School Dist. v. State,* 130 S.W.2d 1038 (Tex.Civ.App.—Eastland 1939, writ dism'd judgmt cor.); *City of Wichita Falls v. State ex rel. Vogtsberger,* 509 S.W.2d 661 (Tex.Civ.App.—Fort Worth 1974, no writ), and declaratory judgment suits, *Citizens National Bank in Abilene v. Cattleman's Production Credit Ass'n,* 617 S.W.2d 731 (Tex.Civ.App—Waco 1981, no writ); *Bracewell v. Fair,* 638 S.W.2d 612 (Tex.App.—Houston [1st Dist.] 1982, no writ) are governed by the general venue rules. TEX.CIV.PRAC. & REM.CODE ANN. sec. 15.001 et seq. (Vernon 1986). Thus Orange County was and is the proper county. Consequently, only the attorney general or the county attorney of Orange County may file the petition for leave to file the quo warranto. For the trial judge to allow any other person, including the criminal district attorney of Jefferson County to bring the quo warranto is in contravention of a mandatory statutory provision and any judgment rendered thereafter is void. *See Downs v. City of Fort Worth,* 692 S.W.2d 209, 212 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.).

ATTORNEYS' FEES

While the majority recognizes that attorneys' fees

are not recoverable in a quo warranto action, they let the attorneys' fees stand because the "action in quo warranto and for declaratory judgment were so intertwined and interrelated as to defy segregation." In the first place, once the quo warranto action was initiated, the declaratory judgment action was no longer appropriate. Ordinarily, quo warranto is the remedy to attack the validity of a city's annexation ordinance. *Hoffman v. Elliott,* 476 S.W. 2d 845, 846 (Tex.1972); *State ex rel. Manchac v. City of Orange,* 274 S.W.2d 886, 899 (Tex.Civ.App.—Beaumont 1955, no writ). Furthermore, a declaratory judgment action is improper and should not be entertained where there is another action, i.e. the quo warranto, pending between the same parties, *Texas Liquor Control Board v. Canyon Creek Land Corp.,* 456 S.W.2d 891, 895 (Tex.1970), *Johnson v. Hewitt,* 539 S.W.2d 239, 240-1 (Tex.Civ.App.—Houston [1st Dist.] 1976, no writ) and should not be used solely to obtain attorneys' fees, *John Chezik Buick v. Friendly Chevrolet,* 749 S.W.2d 591, 594-5 (Tex.App.—Dallas 1988, writ denied). This is simply not a suit in declaratory judgment. A declaratory judgment suit seeks to declare the rights and duties or the status of the parties. The main purpose of the declaratory judgment statute was to create a means to determine the rights of the parties before any wrong had actually been committed. *City of Watauga v. Taylor,* 752 S.W.2d 199, 205 (Tex.App.—Fort Worth 1988, no writ). At both the time Port Arthur filed its initial suit and the quo warranto, the relief sought was not to determine which city had jurisdiction over certain property, but to invalidate Bridge City's annexation. *See Barnett v. City of Colleyville,* 737 S.W.2d 603, 606 (Tex.App.—Fort Worth 1987, writ denied). Therefore, I would hold no attorneys' fees are recoverable.

Even if the declaratory judgment suit and the quo warranto could co-exist, the attorneys' fees should be disallowed because they were not segregated. This very

court in *American Nat'l Bank v. First Wis. Mtg. Trust*, 577 S.W.2d 312 (Tex.Civ.App.—Beaumont 1979, writ ref'd n.r.e.) citing *International Security Life Ins. Co. v. Finck*, 496 S.W.2d 544, 546-7 (Tex.1973) required a plaintiff to segregate the fees and expenses incident to a particular cause of action in which attorneys' fees were recoverable. This was followed in *Kosberg v. Brown*, 601 S.W.2d 414, 418 (Tex.Civ.App.—Houston [14th Dist.] 1980, no writ).

The manner of the awarding of the appellate attorneys' fees was also erroneous. Bridge City complains the award is unconditional and should be conditioned on a successful appeal by Port Arthur. The majority cites only one case, *Reynolds v. McCullough*, 739 S.W.2d 424 (Tex.App.—San Antonio 1987, writ denied) and quotes from the case: "This form of judgment has been approved in several cases before the courts of civil appeals." There are several cases to the contrary. *Siegler v. Williams*, 658 S.W.2d 236 (Tex.App.—Houston [1st Dist.] 1983, no writ) stated at 241:

> Further, a trial court may not penalize a party for taking a successful appeal by taxing him with attorney's fees if he takes such action. Therefore, the trial court must condition the award of attorney's fees to an appellee upon the appellant's unsuccessful appeal. An unconditional award of appellate attorney's fees is improper.

Ortiz v. O.J. Beck & Sons, Inc., 611 S.W.2d 860 (Tex.Civ.App.—Corpus Christi 1980, no writ), *King Optical v. Automatic Data Processing*, 542 S.W.2d 213 (Tex.Civ.App.—Waco 1976, writ ref'd n.r.e.) and a recent case, *Weaver v. King Ready Mix Concrete, Inc.*, 750 S.W.2d 913 (Tex.App.—Waco 1988, no writ) all follow the same rule.

THE SAVINGS CLAUSE OF THE ANNEXATIONS

The majority upholds the trial court's declaration that the entire annexation is void despite the following savings clause:

> If the taking of any territory annexed by this Ordinance is declared by a Court of competent jurisdiction to be invalid and/or illegal, it shall not affect the balance of the property annexed and attempted to be annexed and that property shall remain as part of THE CITY OF BRIDGE CITY, TEXAS.

The majority requires the savings clause to express an "intent to exclude from annexation territory over which it does not have jurisdiction." The conditional language certainly implies such an intent. It should be a simple matter to just exclude that property within Port Arthur's ETJ from the ordinance. However, under the state of the record, that was and still is impossible. It is impossible because Port Arthur provided neither a metes and bounds description of their extraterritorial jurisdiction nor a metes and bounds description of that portion of the annexed property they claimed was within their ETJ. Consequently, no one can, to this day, draft an annexation ordinance for Bridge City, in any area within the proximity of Port Arthur's ETJ, that will not potentially invade Port Arthur's ETJ. Thus, the trial court found itself and the majority find themselves on the horns of a dilemma. There was simply no alternative other than to declare the entire annexation ordinance void.

For the reasons expressed, I would reverse the trial court and render a take-nothing judgment against the City of Port Arthur. Since the majority does not, I respectfully dissent.

APPENDIX E

NO. B-880,738-C

THE STATE OF TEXAS,	X	IN THE
Plaintiff	X	DISTRICT
	X	COURT OF
on the Relation of	X	
CITY OF PORT ARTHUR,	X	
Relator	X	
	X	
VS.	X	ORANGE
	X	COUNTY,TEXAS
	X	
CITY OF BRIDGE CITY,	X	163 RD
Defendant	X	JUDICIAL
	X	DISTRICT

FINAL JUDGMENT

On January 17, 1989, there came on to be heard and considered this matter. Relator, City of Port Arthur, Texas appeared through its Mayor and Attorneys of record; the State of Texas appeared through the Criminal District Attorney of Jefferson County, Texas, by Thomas Rugg, Attorney of record; the City of Bridge City, Texas, appeared through its Mayor and attorneys of record. Intervenor, Gulf States Utilities Company appeared through its attorneys of record. All parties were before the Court and announced ready for trial. It is the judgment of the Court and accordingly ORDERED, ADJUDGED and DECREED:

I.

Bridge City Annexation Ordinance IX 42 adopted January 5, 1988 and Ordinance IX 43 adopted August 2, 1988 are void ab initio and shall have no legal force and effect.

II.

The City of Port Arthur shall have and recover from the City of Bridge City the sum of Eighty-Six Thousand Eighty-Nine and 95/100 Dollars ($86,089.95) in attorneys fees, with remittitur as follows:

(a)$30,000.00 if no appeal is prosecuted in the Court of Appeals;

(b)$15,000.00 if no application for writ of error is prosecuted; and

(c)$5,000.00 if writ of error is not granted by the Texas Supreme Court.

III.

All costs are taxed against defendant City of Bridge City.

IV.

This judgment shall bear interest at ten percent (10%) per annum compounded annually.

SIGNED January 27, 1989.

/s/ Arthur C. Lesher, Jr.

ARTHUR C. LESHER, JR.
JUDGE PRESIDING

APPROVED AS TO FORM:

TOM MANESS
Criminal District Attorney
Jefferson County, Texas

BY /s/ Tom Rugg

Tom Rugg, Assistant
Criminal
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Attorney for Plaintiff,
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Gulf States Utilities Company

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By /s/ Amy Keith

Amy Keith
TBA# 011993

FILED 1989 JAN 30

APPENDIX F

NO. B-880,738-C

THE STATE OF TEXAS,	X	IN THE
Plaintiff	X	DISTRICT
	X	COURT OF
on the Relation of	X	
CITY OF PORT ARTHUR,	X	
Relator	X	
	X	
VS.	X	ORANGE
	X	COUNTY, TEXAS
	X	
CITY OF BRIDGE CITY,	X	163 RD
Defendant	X	JUDICIAL
	X	DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court makes the following findings of fact and conclusions of law based upon the evidence admitted and argument of counsel thereon.

FINDINGS OF FACT

1. Port Arthur, Texas was originally incorporated in May 18, 1898 by Act of the Texas Legislature.

2. Port Arthur is domiciled in Jefferson County, Texas.

3. Port Arthur adopted the Home Rule Amendment to the Texas Constitution by election on the 8th day of March, 1932.

4. Port Arthur has been a Home Rule City continuously since March 8, 1932.

5. The Federal Decenial census shows the population of Port Arthur as:

1960 - 66,676
1970 - 57,371
1980 - 61,251

6. Port Arthur first exercised a limited municipal jurisdiction over a part of the area now included in the area of its extraterritorial jurisdiction in 1913. This was an area 2500 feet in width on each side of the centerline of the Neches River from its mouth for a distance 20 miles north.

7 The 1913 annexation was for limited purposes of aiding navigation and establishing and maintaining wharves etc. pursuant to Article 1183, Revised Civil Statutes.

8. The area on the east side of the Neches River included in the 1913 annexation was largely tidal marsh or low wet land periodically innundated.

9. The marsh described in No. 8, above, was not then and is not now readily suitable for the usual residential, commercial or industrial development construction and habitation.

10. Port Arthur adopted the following annexation ordinances:

Ordinance No.	DATE OF ADOPTION
(1) 1433	Aug. 22, 1950
(2) 1725	Feb. 1, 1955
(3) 1726	Feb. 1, 1955

Ordinance No.	Date of Adoption
(4) 2504	Aug. 12, 1959
(5) 2530	Oct. 28, 1959
(6) 2531	Oct. 28, 1959
(7) 2540	Nov. 4, 1959
(8) 2542	Nov. 11, 1959
(9) 2738	June 8, 1961
(10) 71-74	Sept. 7, 1971
(11) 75-79	Dec. 22, 1975
(12) 75-91	Dec. 22, 1975

11. Upon completion of the annexations No. 1 - 9, above, the boundaries of Port Arthur on June 8, 1961, were [where relevant to this case] along the center line of the Neches River, which also is a line separating Jefferson and Orange Counties.

11a. The territory encompassed by Port Arthur Annexation Ordinance 2738 lay entirely within the territory previously annexed by Port Arthur in 1913 for limited purposes of regulation of navigtation pursuant to then Art. 1183, Revised civil Statutes (See finding No. 6 hereof).

12. Port Arthur's extraterritorial jurisdiction became effective August 23, 1963.

13. Port Arthur's extraterritorial jurisdiction extended 3 ½ miles from its boundary to the east.

14. Port Arthur's extraterritorial jurisdiction overlapped with that of City of Orange.

15. The case styled B-77,678, *State of Texas E. Rel. City of Orange v. City of Port Neches et al,* In the 60th District Court of Jefferson County, Texas, hereinafter known as B-77,678 was a proceeding brought by the Criminal District Attorney (D/A) of Jefferson County, Texas in the name of the State of Texas as an information in quo warranto.

16. Port Arthur was an intervening relator in # B-77,678.

17. The Criminal District Attorney of Jefferson County and Port Arthur obtained a judgment in # B-77,678 which pertinent hereto provided:

> "(6) Pursuant to the Municipal Annexation Act, Article 970a, V.A.T.S., the present extraterritorial jurisdiction of the City of Port Arthur extends for a distance of three and one-half (3 ½) miles from the corporate limits of the City of Port Arthur as established by its Ordinance Nos. 2530, 2540 and 2738, all of which were plead by caption in Port Arthur's amended information in the nature of a quo warranto, free and clear of any municipal jurisdiction or extraterritorial claims of the City of Orange or *any other municipality of the State of Texas,* which three and one-half (3 ½) miles encompasses substantially all of Gulf States Utilities Company's Sabine Station: and that Gulf States Utilities Company, pursuant to the Municipal Annexation Act, and the release by the City of Orange of all extra-territorial claims threrto, has petitioned the City of Port Arthur to include its extra-territorial jurisdiction all of the property of Gulf States Utilities Company known as Sabine Station. . .is therefore included within

> the extra-territorial jurisdiction of the City of Port Arthur, so as to place all of Gulf States Utilities Company's property designated as Sabine Station, aforesaid, within the exclusive extra-territorial jurisdiction of one municipality, whether or not said property described in Exhibit "A" is located, in its entirety, within three and one-half (3 ½) miles from the corporate limits of the City of Port Arthur;" (emphasis added)

18. No motion for new trial, notice of appeal, appeal bond, or appeal was filed after judgment was entered April 22, 1970 in # B-77,678.

19. Judgment in # B-77,678 became final on May 22, 1970.

20. In 1959 Port Arthur first entered into an "industrial district contract" with the Atlantic Refining Co. This contract related to an area within the 1913 limited annexation territory (see finding #6 above) on the west side of the Neches River.

21. On August 22, 1963 the area included within the Atlantic Refining Co. boundaries described above became a part of the extraterritorial jurisdiction of Port Arthur.

22. Since August 22, 1963, (# 21 above) such area has been designated as an industrial district and Port Arthur has contracted with the then owners of an oil refinery located within such industrial district. Local Government Code Sect. 42.044.

23. In 1970, and at all times thereafter the Gulf States Utilities Company Sabine Power Plant has been present within the extraterritorial jurisdiction of Port Arthur described in the judgment in # B-77,678.

24. On May 20, 1970, Port Arthur contracted with Gulf States Utilities Company as an owner of land in the industrial district to guarantee the continuation of the extraterritorial status of the district and its immunity from annexation by the municipality for a period not to exceed seven years. Sect. 42.044(c)(1).

25. The contract between Port Arthur and Gulf States Utilities Company was renewed for successive terms of seven years and expires in 1991. (Sect. 42.044(d) in 1984.)

26. At no time between April 22, 1970 (Judgment # B-77,678) to August 2, 1988 has any municipality other than the City of Port Arthur attempted to annex or exercise jurisdiction over the Gulf States Utilities Company power plant.

27. Bridge City, Texas, incorporated under the general laws of Texas in 1970.

28. Bridge City is domiciled in Orange County, Texas.

29. The 1980 Federal Decenial census shows the Bridge City population to be 7667.

30. Certain citizens of an unincorporated area of Orange County had

(a) on December 3, 1969 filed cause # 17,544 in the District Court of Orange County seeking an election to incorporate the City of Bridge City; and

(b) on December 12, 1969 Petitioned Port Arthur for permission to form a municipal corporation within the extraterritorial jurisdiction of Port Arthur fixed by the judgment in #B-77,678.

31. By resolution # 70-19, dated March 11, 1970, Port Arthur consented to formation of the municipal corporation now known as Bridge City.

32. Such consent was conditioned upon:

(a) notwithstanding the description of the area set forth in Exhibit "A" hereto, the City of Port Arthur does not consent to the incorporation by the said proposed Bridge City of any area located westerly of the most easterly east boundary line of the Sarah M. Luce Survey, Abstract 253, of Orange County, Texas, or any area located westerly of a northerly and southerly extension of said most easterly east boundary line;

(b) that this consent shall be strictly limited to the area of incorporation as described in said Exhibit "A" and shall in no wise extend to any other part of the extraterritorial jurisdiction of the City of Port Arthur; and

(c) nothing in this consent shall be construed or effective as giving any such incorporated City of Bridge City any extraterritorial or other rights in an to the area now within the extraterritorial jurisdiction of the City of Port Arthur other than the area described in Exhibit "A" hereto, and the City of Port Arthur hereby retains exclusive extraterritorial jurisdiction over all areas now within such jurisdiction.

33. Bridge City Annexation Ordinances IX 42 and IX 43 encompass territory in Port Arthur's extraterritorial jurisdiction which is westerly of the most easterly east boundary line of the Sarah M. Luce Survey, Abstract 253, of Orange County, Texas, or a northerly and southerly extension of said most easterly east boundary line.

34. In February, 1976, Bridge City petitioned Port

Arthur to relinquish a small area of its extraterritorial jurisdiction for annexation by Bridge City.

35. Port Arthur declined to act on such petition and the proposed annexation by Bridge City did not occur.

36. In 1979, Bridge City petitioned Port Arthur to relinquish two small areas of land within its extraterritorial jurisdiction. Port Arthur granted said petition by resolution of City Council #79-185, dated April 30, 1979.

37. Bridge City petitioned Port Arthur in 1982 to relinquish a small area of land within its extraterritorial jurisdiction. Port Arthur granted said petition by resolution of City Council #82-324, dated December 28, 1982.

38. By Ordinance IX 42, adopted January 5, 1988, Bridge City purported to annex a portion of the territory within the extraterritorial jurisdiction of Port Arthur as fixed by Judgment in # B-77,678.

39. By Ordinance IX 43, adopted August 2, 1988, Bridge City purported to annex a portion of the territory within the extraterritorial jurisdiction of Port Arthur as fixed by Judgment in # B-77,678.

40. The territory described in Bridge City Annexation Ordinance IX 43 lies wholly within the extraterritorial jurisdiction of Port Arthur.

41. The territory described in Bridge City Annexation Ordinance IX 43 includes the Gulf States Utilities Company Power Plant.

42. The territory described in Bridge City Annexation Ordinance IX 42 includes territory lying partially within the extraterritorial jurisdiction of Port Arthur.

43. The territory described in Bridge City Annexation Ordinance IX 43 is not either contiguous or adjacent to the City of Bridge City, except as contiguous to territory included in IX 42.

44. The territory described in Bridge City Annexation Ordinances IX 42 and IX 43 is not owned by the City of Bridge City.

45. Bridge City did not notify Port Arthur of its plan, intent or act of adopting Ordinances IX 42 and IX 43.

46. The territory described in Bridge City Annexation Ordinance IX 43 is only 500 linear feet in width at its narrowest point and is less than 1,000 feet in width at said point.

47. Except as found in Findings No. 30 through 38 above, no municipal corporation attempted to form or exercise municipal jurisdiction over any part of the territory fixed as the extraterritorial jurisdiction of Port Arthur by Judgment #B-77,678 between, April 22, 1970 and January 5, 1988, the date of Bridge City Ordinance IX 42.

48. The Attorney General of Texas declined to join in this proceeding on behalf of the State upon relation of Port Arthur.

49. The Orange County Attorney declined to join in this proceeding on behalf of the State upon relation of Port Arthur.

50. The Criminal District Attorney of Jefferson County, Texas, upon relation of Port Arthur, sought to file this proceeding in quo warranto.

51. The Criminal District Attorney of Jefferson

County, Texas, was a party to and obtained the Judgment in Cause # B-77,678.

52. Bridge City Annexation Ordinances # IX 42 and IX 43 violate or contravene the terms of the Judgment in Cause # B-77,678.

53. Bridge City was not in existence and thus not a party to Cause # B-77,678.

54. Port Arthur has not relinquished from its extraterritorial jurisdiction any of the territory sought to be annexed by Bridge City Ordinances IX 42 or IX 43.

55. It was necessary for the City of Port Arthur to engage attorneys to prepare and prosecute this lawsuit.

56. The fees charged by the City of Port Arthur's attorneys are reasonable, the hours expended, costs incurred and work done by them were necessary for the preparation and presentation of this case.

57. The Court finds that reasonable and necessary attorneys fees are in the amount of $56,089.95 through the entry of judgment in this cause; an additional $15,000 in the event the cause is appealed to a Court of Appeals; and additional $10,000 in the event that writ of error is sought to the Supreme Court of Texas; and an additional $5,000 in the event writ of error is granted by the Supreme Court of Texas.

58. It is equitable and just to award attorneys fees and costs to the City of Port Arthur.

CONCLUSIONS OF LAW

59. The Court has jurisdiction of the parties and subject

matter of this cause.

60. The Criminal District Attorney of Jefferson County, Texas, is a "proper" officer to institute this quo warranto proceeding.

61. The City of Port Arthur may challenge as void *ab initio* the Bridge City Annexation Ordinances IX 42 and IX 43 in a declaratory judgment proceeding without the necessity of quo warranto.

62. The final judgment in the quo warranto proceeding, Cause # B-77678 in the District Court of Jefferson County, Texas, is preclusive of the issues:

(a) the corporate boundaries of the City of Port Arthur (where relevant here) are the center line of the Neches River;

(b) the Gulf States Utilities Sabine Station is within the exclusive extraterritorial jurisdiction of the City of Port Arthur; and

(c) the exclusive extraterritorial jurisdiction of the City of Port Arthur is as defined therein.

63. The City of Bridge City, while not a party to Cause # B-77678, is bound by the determinations therein made.

64. Bridge City Annexation ordinances IX 42 and IX 43 are each void for each of the following reasons:

(a) they attempted to annex territory within the exclusive extraterritorial jurisdiction of the City of Port Arthur; and

(b) they attempted to annex territory that was not legally adjacent to the corporate limits of Bridge City.

65. Bridge City Annexation Ordinance IX 43 is void because in addition to those described in conclusion #65 above the territory attempted to be annexed was less than 1000 feet in width at its narrowest point.

66. The City of Port Arthur and Criminal District Attorney of Jefferson County are entitled to the relief they seek.

67. The City of Port Arthur is entitled to recover reasonable and necessary attorneys fees and costs.

SIGNED January 25, 1989.

/s Arthur C. Lesher, Jr.

ARTHUR C. LESHER, JR.
JUDGE PRESIDING

FILED — 1989 JAN 26

APPENDIX G

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H

AMENDMENT VIII—EXCESSIVE BAIL, FINES, PUNISHMENTS

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

APPENDIX I

TEX. CONST. ANN. art. I, § 19

§ 19. Deprivation of life, liberty, etc.; due course of law

Sec. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

APPENDIX J

TEX. CONST. ANN. art. I, § 3

§ 3. Equal rights

Sec. 3. All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

APPENDIX K

TEX. CONST. ANN. art. I, § 13

§ 13. Excessive bail or fines; cruel and unusual punishment; remedy by due course of law.

Sec. 13. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

APPENDIX L

TEX. CONST. ANN. art. V, § 21

§ 21. County attorneys; district attorneys

Sec. 21. A County Attorney, for counties in which there is not a resident Criminal District Attorney, shall be elected by the qualified voters of each county, who shall be commissioned by the Governor and hold his office for the term of four years. In case of vacancy the Commissioners Court of the county shall have the power to appoint a County Attorney until the next general election. The County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys and County Attorneys shall in such counties be regulated by the Legislature. The Legislature may provide for the election of District Attorneys in such districts, as may be deemed necessary, and make provision for the compensation of District Attorneys and County Attorneys. District Attorneys shall hold office for a term of four years, and until their successors have qualified. As amended Nov. 2, 1954.

NO. 90-1455
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

Supreme Court, U.S.
FILED
MAR 27 1991
OFFICE OF THE CLERK

CITY OF BRIDGE CITY, TEXAS
Petitioner

VS.

STATE OF TEXAS, EX REL.
CITY OF PORT ARTHUR, TEXAS, ET AL,
Respondents

OPPOSITION TO WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

OPPOSITION TO WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Because this case was heard in the state courts, 28 U.S.C. Section 1254 does not invoke this Court's jurisdiction.

II. The City of Bridge City failed to raise in the lower courts the federal questions which form the basis of its petition for writ of certiorari.

III. Writ of Certiorari should be denied because a political subdivision of the State cannot invoke the protection of the Due Process or Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution.

IV. The method of applying a state statute allowing attorneys fees is strictly a matter of interpretation for the state courts and cannot be said to violate the Fourteenth Amendment.

V. The Eighth Amendment does not apply to attorneys fees granted in a civil suit where a municipal corporation is acting as an ordinary litigant.

VI. The award of attorneys fees pursuant to well established rules does not violate the Eighth Amendment.

LIST OF PARTIES

The parties to the proceedings below were:

Petitioner: The City of Bridge City, Texas;

Respondents: The State of Texas, ex rel. City of Port Arthur and the City of Port Arthur as Declaratory Judgment Plaintiff and Appellee in the state courts.

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City of Trenton v. New Jersey, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923).	6
Hartford Life Insurance Company v. Blinco, Administratrix of Barber, 255 U.S. 129, 138, 41 S.Ct. 276, 65 L.Ed. 549 (1921).	7, 8
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Reynolds v. McCullough,
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South Macomb Disposal
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Street v. New York,
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NO. 90-1455

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

CITY OF BRIDGE CITY, TEXAS
Petitioner

VS.

STATE OF TEXAS, EX REL.
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OPPOSITION TO WRIT OF CERTIORARI TO THE
SUPREME COURT
OF THE STATE OF TEXAS

OPPOSITION TO WRIT OF CERTIORARI

The respondents State of Texas, ex. rel. City of Port Arthur and the City of

Port Arthur, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Texas Supreme Court's decision denying writ of error in this case on October 31, 1990.

STATEMENT OF THE CASE

Petitioner is not a resident of Orange County (Petition for Writ of Certiorari, p. 2) but rather is a municipal corporation formed under the laws of the State of Texas and which is domiciled in Orange County, Texas.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Writ of certiorari should be denied because Petitioner incorrectly states that jurisdiction lies under 28 U.S.C. Section 1254.

Petitioner is applying for a writ of

certiorari to the Texas Supreme Court on a case heard in the Texas courts, therefore, there is no jurisdiction under 28 U.S.C. Section 1254.

2. Because Petitioner raised no federal question in the State courts, there is no jurisdiction.

The City of Bridge City failed to raise the federal questions presented here before the "court of first instance" and the appellate courts. Under 28 U.S.C. Section 1257, the petitioner is required to have set out and claimed the right under the Constitution which it is seeking to enforce. Pacific Mutual Life Insurance Company v. Haslip, 111 S.Ct. 1032 (1991) other publications not

available; Webb v. Webb, 451 U.S. 493, 495; 101 S.Ct. 1889, 1891; 68 L.Ed.2d 392 (1981); see also Prune Yard Shopping Center v. Robins, 447 U.S. 74, 85, n.9; 100 S. Ct. 2035, 2043, n.9; 64 L.Ed.2d 741 (1980); Tacon v. Arizona, 410 U.S. 351; 93 S.Ct. 998; 35 L.Ed.2d 346. By failing to present to the state courts the constitutional issues raised here, Petitioner has failed to meet the jurisdictional requirements of 28 U.S.C. Section 1257. Webb, supra.

The City of Bridge City, as petitioner for writ of certiorari, must show that the federal question was raised, the manner in which it was raised and the decision of the state court on the federal question. The opinions of

the state courts appended to the Petition for Writ of Certiorari do not mention any federal question. Where the federal issues are not mentioned in the opinions of the state courts, this Court assumes that the "omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." Webb, supra; citing Street v. New York, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360, 22L.Ed.2d 572 (1969). In this case, Petitioner completely failed to raise the federal issues and cannot show proper presentation or a decision of the state courts on those issues.

3. A political subdivision of the State cannot invoke the protection of the Due Process or Equal Protection Clauses of the Fourteenth Amendment to the Constitution.

Because of its nature as a creation of the state, a municipality may not invoke the protection of the Fourteenth Amendment against the action of the state. Williams v. Mayor & City Council of Baltimore, 289 U.S. 36, 40, 53 S.Ct. 431, 432, 77 l.Ed. 1015 (1933); Alexander Milburn Co. v. Davis Bournonville Co., 270 U.S. 390, 46 S.Ct. 324, 70 L.Ed. 651 (1926); City of Trenton v. New Jersey, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923); South Macomb Disposal v. Township of Washington, 790 F2d 500, 504-505 (6th Cir. 1986).

4. The method of applying a state statute allowing attorneys fees is strictly a matter of interpretation for the state courts and cannot be said to violate the Fourteenth Amendment.

The Texas Ninth Court of Appeals determined that the trial court had correctly calculated and awarded attorneys fees. See Appendix D to Petition for Writ of Certiorari. The Texas Supreme Court denied Petitioner's application for writ of error. See Appendix B to Petition for Writ of Certiorari. This Court has held that the method of applying a state statute allowing attorneys fees is strictly a matter of interpretation for the state courts. Hartford Life Insurance Company

v. Blinco, Administratrix of Barber, 255 U.S. 129, 138, 41 S.Ct. 276, 65 L.Ed. 549 (1921). In Blinco, the petitioner claimed that the state court had improperly awarded attorneys fees to the opposing party when petitioner had prevailed on every issue thus depriving petitioner of its property without due process of law. This Court held that they would not review the decision of the state court construing a state statute and that such construction was not a violation of the Fourteenth Amendment. Id. Bridge City's claim regarding attorneys fees is identical to that in Blinco except that Bridge City lost on every issue. The trial court properly applied Texas rules for awarding

attorneys fees and such application cannot be said to violate either the Fourteenth Amendment or the Eighth Amendment.

5. The Eighth Amendment does not apply to attorneys fees granted in a civil suit where a municipal corporation is acting as an ordinary litigant.

The City of Port Arthur did not recover attorneys fees as the state government recovering a fine from a criminal or civil litigant. The City of Port Arthur as an ordinary civil litigant has not imposed some governmental action which would restrain the civil liberties of another or lead to some sort of governmental overreaching. Browning-

Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,492 U.S. 257, 109 S.Ct. 2909, 2914, n. 3,106 L.Ed.2d 219. Rather, Port Arthur recovered attorneys fees under the Texas Declaratory Judgment Act which provides:

> In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just.

Tex. Civ. Prac. & Rem. Code Ann., Section 37.009 (West 1986). As such, Port Arthur committed no action which would bring it under the purview of the Eighth Amendment. Browning-Ferris, supra.

6. The award of attorneys fees pursuant to well established rules does not violate the Eighth Amendment.

The trial court awarded attorneys fees based on statutory and case law and not on unlimited judicial discretion. Haslip, supra. For the method of awarding attorneys fees see Reynolds v. McCullough, 739 S.W. 2d 424 (Tex. App.-- San Antonio 1987, writ denied). The Texas Ninth Court of Appeals found that the City of Port Arthur was entitled to recover attorneys fees under the Texas Civil Practice and Remedies Code, Sections 37.001 - 37.011. Additionally the Court of Appeals found that because the quo warranto action and the declaratory action arose out of the same transaction and are so intertwined that they involve the same proof, that segregation of fees incurred in

prosecuting each action was not possible. Because the trial court awarded attorneys fees pursuant to well established rules, and not "unlimited judicial discretion", there is no violation of the Eighth Amendment. Haslip, supra.

CONCLUSION

For the reasons set out above, the writ of certiorari should be denied.

Respectfully submitted,

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CITY OF PORT ARTHUR

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

CITY OF BRIDGE CITY, TEXAS
Petitioner

VS.

STATE OF TEXAS, EX REL.
CITY OF PORT ARTHUR, TEXAS, ET AL,
Respondents

CERTIFICATE OF SERVICE

I, Robert Q. Keith, a member of the Bar of this Court, hereby certify on the 18th day of April, 1991, a copy of the Opposition to Writ of Certiorari in the above-entitled case was mailed, certified mail, return receipt requested, to each of the following counsel for the Petitioner herein. I further certify that all parties required to be served have been served.

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